SUPREME COURT, U. S.

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IN THE

United States Supreme Court

OCTOBER TERM, 1965

No. 264

CONTRACT CARRIERS, INC. and
JOSEPH L. McCORKHILL,
Petitioners,

v.

JOHN ANTHONY MARKIEWICZ, a minor
by his father and next friend,
EDWARD MARKIEWICZ, and
EDWARD MARKIEWICZ, and
JENNIE MARKIEWICZ, and
THE GREYHOUND CORPORATION, and
ROBERT L. SCHLAGENHAUF,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Seventh Circuit entered in the entitled case on March 24, 1966.

CITATION TO OPINIONS BELOW

Judgment without opinion of the United States District Court for the Southern District of Indiana, Indianapolis Division, was entered following trial without jury. The opinion of the United States Court of Appeals for the Seventh Circuit affirming judgment is reported in 358 F. 2d 26 and is reprinted in Appendix A, p. 2a.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 11, 1966, reprinted in Appendix A, p. 1a. Petition for rehearing *en banc,* timely filed, was denied on March 24, 1966, Appendix A, p. 12a. The jurisdiction of the Court is invoked under 28 USC, Section 1254 (1).

QUESTIONS PRESENTED

1. Was the determination of causal negligence, based solely on the speed of Petitioners' tractor-trailer which was struck from the rear by the speeding bus, clearly erroneous?

2. Is the determination of negligence, as distinguished from the evidentiary facts upon which it is based, a finding of fact under the provisions of Rule 52(a) of the Federal Rules of Civil Procedure or a conclusion of law freely reviewable on appeal?

3. Did the Circuit Court of Appeals err in not making an independent determination as to whether correct legal standards had been applied by the trial judge to essentially undisputed facts?

4. Is the Circuit Court of Appeals required in a court tried case to determine the correctness of the conclusions of law and to review the inferences drawn from essentially undisputed facts to determine if they are proper and, if so, did the 7th Circuit fulfill its duty in this case?

5. Does the Circuit Court of Appeals have a duty to review the findings of fact in a court tried case to see if they are supported by substantial evidence of probative value and, if so, did the 7th Circuit fulfill its obligation as reviewing court in this case?

6. Did the 7th Circuit Court of Appeals follow correct Federal procedure to resolve a conflict between panels of that court?

STATUTES AND FEDERAL RULES INVOLVED

§ 47-2006 Burns' Indiana Statutes Annotated (1952 Replacement Supp.)

> "No person shall drive a motor vehicle at such a low speed as to impede the normal and reasonable movement of traffic, except when reduced speed is necessary for safe operation, or in compliance with the law."

§ 47-2010 Burns' Indiana Statutes Annotated (1955 Replacement)

> "Upon all roadways of sufficient width, a vehicle shall be driven upon the right half of the roadway except as follows:
>
> "1. When overtaking and passing another vehicle proceeding in the same direction under the rules governing such movement; * * *

"5. Upon all roadways any vehicle proceeding at less than the normal speed of traffic at the time and place under the conditions then existing shall be driven in the right hand lane then available for traffic or as close as practicable to the right hand curb or edge of the roadway, except when overtaking and passing another vehicle proceeding in the same direction or when preparing for a left turn at an intersection or into a private road or driveway."

§ 47-2214(c) Burns' Indiana Statutes Annotated (1952 Replacement)

"SEC. 2. When any truck tractor, farm tractor, road tractor or implement of husbandry is operated on a federal or state highway at a speed less than twenty miles per hour, there shall be at least one flashing red signal lamp or red flag mounted, at a height of from ten to twelve feet, on such vehicle which shall be visible to the rear of the vehicle for a distance of at least five hundred feet; Provided, That if such flashing red signal lamp or red flag is not clearly visible for at least five hundred feet when mounted on a combination of vehicles, such lamp or flag shall be mounted on the rear vehicle of such combination of vehicles."

Rule 52(a) Federal Rules of Civil Procedure.

"(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the op-

portunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

STATEMENT OF FACTS

This case arose out of a motor vehicle accident which occurred on July 13, 1962, on U. S. 40 near Belleville, Indiana. This accident occurred at approximately 1:05 A.M. when a Greyhound bus struck the left rear of a tractor-trailer operated by Mr. McCorkhill and owned by Contract Carriers, Inc.

At the location of this accident, U. S. 40 is a four-lane, divided highway. There were two lanes for eastbound and two lanes for westbound traffic. The road was straight and the terrain was level to rolling. The weather was clear, the road was dry, and traffic was light. Petitioner McCorkhill was driving his tractor-trailer in the righthand eastbound traffic lane at a speed of 20 to 30 miles per hour. His truck would not go any faster because of a defective accelerator linkage. There were nine (9) red lights on the rear of Mr. McCorkhill's vehicle.

As Mr. McCorkhill was proceeding east, there was another tractor-trailer some distance behind him, also operated in an easterly direction. This unit was driven by a Mr. Stone. Behind Mr. Stone there was a Greyhound bus operated by Mr. Schlagenhauf.

As the three vehicles proceeded toward the point of the accident, the bus passed Mr. Stone going approximately

75 miles per hour which was 10 miles per hour above the speed limit. After clearing Stone's vehicle, it returned to the righthand lane and continued eastward until it collided with the left rear of Petitioners' tractor-trailer. At no time during this sequence of events was there any traffic in the lefthand or passing lane.

The Respondents, John Anthony Markiewicz and Jennie Markiewicz, were passengers on the bus when the collision occurred, and both sustained serious injuries. This case was initiated by Respondents, John Anthony Markiewicz, Jennie Markiewicz, and Edward Markiewicz, the husband of Jennie Markiewicz and father of John Anthony Markiewicz, as a diversity action under 28 U.S.C. §1332, in the United States District Court for the Southern District of Indiana.

During the pre-trial procedure the District Court ordered the bus driver, Robert L. Schlagenhauf, to submit to physical examination which order resulted in an appeal to this court.

> *Robert L. Schlagenhauf, Petitioner* v. *Cale J. Holder, United States District Judge of the Southern District of Indiana* (1964), 379 U. S. 104, 13 L. Ed. 2d 152, 85 S. Ct. 234.

After setting forth guidelines for the application of Rule 35 the case was remanded to the District Court. Thereafter trial was had without jury and findings of fact and conclusions of law made and judgments totaling $625,000.00 were entered against Robert L. Schlagenhauf, The Greyhound Corporation, Joseph L. McCorkhill and Contract Carriers, Inc.

The District Court's judgment against the Petitioners, Contract Carriers, Inc. and Joseph L. McCorkhill, was

based upon the speed of Petitioners vehicle which was found to be 20 to 30 miles per hour, and concluded to be a violation of the Indiana slow speed statute, such speed according to the District Judge deceived and misled the driver of the speeding bus that ran into the rear of the Petitioners' vehicle.

Petitioners, Joseph L. McCorkhill and Contract Carriers, Inc., appealed to the 7th Circuit Court of Appeals. Respondents, Robert L. Schlagenhauf and The Greyhound Corporation, did not appeal the judgments rendered against them.

A three judge panel of the 7th Circuit Court of Appeals considered the appeal and affirmed the decision, with Judge Duffy dissenting. The majority opinion of the Court of Appeals concluded that the determination of negligence by the Trial Judge based upon essentially undisputed facts should be treated as finding of fact not to be disturbed by the Court of Appeals, regardless of whether they might have concluded otherwise. A Petition for Rehearing *En Banc* was filed and denied with Judge Duffy dissenting.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I

CLEARLY ERRONEOUS JUDGMENTS OF LOWER COURTS SHOULD BE REVERSED.

The decision below should be reviewed because upon consideration of the entire evidence one is left with the definite and firm conviction that a mistake has been committed.

This Court has said it will reverse judgments of lower courts when such judgments are "clearly erroneous." A

judgment is clearly erroneous when even though there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

> *McAllister* v. *U. S.* (1954), 348 U. S. 19, 99 L. Ed 20, 75 S. Ct. 6.

In this case we are confronted with a holding that a truck driver traveling 20 to 30 miles per hour in his proper lane on a divided four-lane highway without more is negligent. This holding is reached in spite of the fact that the truck was traveling east at the extreme right of the highway and there was a second eastbound lane completely clear and unobstructed. This holding is reached even though the truck had nine (9) red lights burning which were visible to the rear for 500 feet. This holding was reached even though the bus which struck the rear of the truck was traveling 75 miles an hour in violation of a speed statute.

Judge Duffy saw the shocking result of this case when he considered all of the evidence in this case. In his dissenting opinion he said:

> "I respectfully dissent. At the time of the collision, the tractor-trailer was traveling entirely within the righthand lane of the two eastbound traffic lanes. Under Indiana law, this is where the tractor-trailer should have been. There were nine red lights lit on the rear of the trailer visible for a distance of some 500 feet or more. These lights were in compliance with Indiana statutes and interstate commerce regulations. The tractor-trailer was traveling on a divided four-lane highway which, at the point of the accident, was straight and of level to rolling terrain. It had wide shoulders. The weather was clear and dry with good

visibility. The Court found the tractor-trailer had been traveling at a speed of 20 to 30 miles per hour, although the probative evidence shows the speed to have been 25 to 30 miles per hour.[1]

"I am convinced that if the tractor-trailer had been traveling at a speed of 30 to 40 miles per hour, or even at a higher speed, the collision would still have occurred. It is of no importance whether a faulty accelerator part was the reason for the 20 to 30 mile speed, or whether the tractor-trailer was slowing down to turn into the next filling station. In this case, the cause of the tractor-trailer's speed cannot be a proximate cause of the collision.

"The bus driver, Schlagenhauf, had the entire inner east-bound lane in which to pass the tractor-trailer. This lane was clear, unobstructed, and about fourteen feet in width.

"The majority opinion affirms the District Court in holding the driver of the tractor-trailer violated the Indiana statute which provides—'No person shall drive a motor vehicle at such a low speed as to impede the normal and reasonable movement of traffic, except when reduced speed is necessary for safe operation, or in compliance with the law.' Burns' Indiana Statutes Annotated (1952 Replacement, Supp.) § 47-2006

"It is apparent that a slow moving vehicle can impede the normal and reasonable movement of traffic on a 2-lane highway, but it is beyond my comprehension how this can be done by a vehicle traveling in the extreme right-hand lane of a four-lane highway where the second east-bound lane is clear and free from all obstruction. These are the circumstances present in this case.

"The District Court also suggested the tractor-trailer should have had warning lights in addition to

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[1] The evidence in this case consists mainly of depositions and other documentary evidence.

the nine which were lit. However, the Indiana Statutes make it clear that vehicles proceeding at less than normal speed of traffic are specifically authorized to continue operating upon the highways without additional warning lights as long as they operate as close as possible to the right-hand side of the highway, unless the vehicle's speed is less than 20 miles per hour. That is not the situation in the case at bar.

"There was no minimum speed limit in effect at the time and place in question. The highway was not an expressway, freeway, or any other type of limited access highway.

"The collision occurred because of the bus driver's lack of look-out. The bus was traveling at a speed of about 75 miles an hour. In my judgment, the failure of Schlagenhauf, the driver of the bus, to keep a proper look-out was the sole, active, direct, independent and effective cause of the plaintiffs' injuries. *Hayes Freight Lines v. Wilson,* 226 Ind. 1, 77 N. E. 2d 580; *Huey v. Milligan,* 242 Ind. 93, 175 N. E. 2d 698."

It is manifestly unjust for Petitioners, Contract Carriers, Inc. and Joseph L. McCorkhill, to be held jointly and severally liable with Respondents, Greyhound Corporation and Robert L. Schlagenhauf, for the judgments of $625,000.00 simply because the vehicle driven by Mr. McCorkhill was traveling 20 to 30 miles per hour, when it was struck from the rear by a speeding bus. The final result of this case is so shockingly wrong as to warrant this Court to consider the facts and apply the law.

II

THE FAILURE OF LOWER COURTS TO PROPERLY CONSTRUE AND APPLY DECISIONS AND GUIDELINES ESTABLISHED BY THE SUPREME COURT IS A DEPARTURE FROM ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEDURE WHICH SHOULD BE CORRECTED.

The Court of Appeals misconstrued and misapplied earlier decisions and guidelines of the Supreme Court thereby departing from the accepted and usual course of judicial procedure. In reviewing the decision of the District Court, the Court of Appeals refused to review the findings of fact to determine if they were supported by the quantity and quality of evidence required by Federal procedure, and refused to review the District Court's conclusions of law.

This Court has held that findings of fact without the support of substantial evidence of probative value, conclusions of law and mixed findings of fact and conclusions of law are not binding on the reviewing court.

Helvering v. *Tex Penn Oil Co.* (1936), 300 U. S. 481, 81 L. Ed 755, 57 S. Ct. 569.

A

REVIEWING COURTS SHOULD DETERMINE IF THERE IS SUBSTANTIAL EVIDENCE OF PROBATIVE VALUE WHICH, WHEN CONSIDERED IN LIGHT OF OTHER CREDIBLE EVIDENCE, REFLECTS OR REPRESENTS THE TRUTH AND RIGHT OF THE CASE.

It is settled Federal procedure that a reviewing court will determine if there is substantial evidence of probative value which, when considered in light of other credible

evidence, will reflect or represent the truth and right of the case. Also, it is settled Federal procedure that a reviewing court will determine whether the District Court misconstrued the evidence.

Sanders v. *Leach* (5th CCA, 1946), 158 F. 2d 486;

Western Cotton Oil Company v. *Hodges* (5th CCA, 1954), 218 F. 2d 158.

The Seventh Circuit Court of Appeals failed to follow this accepted procedure.

A fair recital of the evidence establishes that Petitioners' vehicle had nine (9) red lights on the rear of the trailer all properly lighted; that it was being operated entirely in the right lane of the two eastbound lanes of the highway proceeding at 20 to 30 miles per hour with the other lane for eastbound traffic clear; that eastbound traffic was light, weather was clear and dry, and visibility good. The bus passed another tractor-trailer unit operated by one Stone going 75 miles per hour in violation of speed statutes. The bus cleared Stone's vehicle then pulled into the lane occupied by Petitioners' truck and continued eastward until the bus crashed into the rear of Petitioners' truck. Stone testified that after the collision he then did everything in his power to stay out of the collision debris.

Upon this evidence, the trial court found:

> "11. The low speed of the tractor-trailer unit as determined in these findings of fact impeded the normal and reasonable movement of traffic at the time and place in question and its slow speed was deceptive and misleading to the safety of those operators approaching from the rear of the unit including the operator of the bus and Mr. Stone, the operator of the other tractor-trailer, who was barely able to avoid the colliding vehicles."

This finding, based upon mental operations of the bus driver and omnisciently ascribing to him a state of mind, is so speculative and conjectural that it does not reasonably represent a finding of fact or an inference from a fact. The impropriety of this so-called finding of fact renders clear the merit of the dissenter's position that no causal relationship exists between the conduct of the Petitioners and the accident. The examination of the whole evidence at the appellate level by the dissenting judge demonstrates the functions which should have been performed by the Circuit Court of Appeals. When that is done, it is obvious that the finding that the driver of the bus was misled and deceived under the circumstances by the restricted speed of the Petitioners' tractor-trailer is not supported by substantial evidence with probative value, but is a judge-made justification to buttress a result that fails to conform to the standards required by Federal procedure. It is vital that Courts of Appeal provide effective review in order for the Federal judiciary system to function.

B

THE EXISTENCE OR NON-EXISTENCE OF NEGLIGENCE IS A LEGAL CONCLUSION

The existence or non-existence of negligence is a legal conclusion.

> *Gediman* v. *Anheuser-Busch, Inc.* (2d CCA, 1962), 299 F. 2d 537, 542.

The Seventh Circuit Court of Appeals, however, considered it a factual question when it held:

> "The real issue on this appeal concerns the question of appellant's causal negligence. Whether or not, under the circumstances revealed by the record, the

> operation of the Contract Carriers, Inc. tractor-trailer was at such a low speed as to deceive others upon the highway and to constitute an impediment to traffic must be determined by the trier of the facts."

This holding was made in spite of the rule laid down by this Court in *United States* v. *Mississippi Generating Company* (1961), 364 U. S. 520, 81 S. Ct. 294, 5 L. Ed 2d 268, when it held:

> "However it should be noted that our reliance upon the findings of fact does not preclude us from making an independent determination as to the legal conclusions and inferences which should be drawn from them."

If this deviation from an accepted standard is erroneously embraced by the Seventh Circuit, many litigants other than those now before this Court will be adversely affected. But if injustice results to even one litigant, it is sufficient reason for this Court to reassert its directive that conclusions of law be reviewed. The tendency of the Circuit Court of Appeals to dodge issues by erroneously labeling conclusions of law as findings of fact demands corrective action. Without such action, review in court-tried cases becomes meaningless.

C

WHERE THE FACTS ARE ESSENTIALLY UNDISPUTED THE APPLICATION OF A STANDARD TO SUCH FACTS PRESENTS ONLY A QUESTION OF LAW.

The Seventh Circuit Court of Appeals further deviated from the accepted and usual course of judicial procedure in failing to review the standard applied with reference to the Indiana slow speed statute. This deviation is in clear conflict with prior decisions of this Court.

U. S. v. *Singer Mfg. Co.* (1963), 374 U. S. 174, 10 L. Ed. 2d 823, 83 S. Ct. 1773;

U. S. v. *Parke, Davis & Co.* (1960), 362 U. S. 29, 4 L. Ed. 2d 505, 80 S. Ct. 503.

Both *Singer* and *Parke Davis* held that where there are essentially undisputed facts the application of a standard necessarily presents only a question of law. Meaningful review is lost when the appeal court refuses to disturb a trial judge's determination that there has been a violation of a slow speed statute upon the ground that such determination is a finding of fact. The speed of the tractor-trailer was a fact but whether there was a violation of the statute is a legal conclusion. The appeals court may and should make an independent determination as to the legal conclusions and inferences which should be drawn from the facts. Unless the appeal court performs this function, a party achieves no review. Because the Court of Appeals declined to review the standard applied by the District Court a greater burden has been placed on this Court. This case should be reviewed by this Court to settle the proper function of the Court of Appeals to review legal standards applied by a trial court.

III

WHERE THERE IS A CONFLICT AMONG THE CIRCUITS AS TO WHETHER A JUDGE'S DETERMINATION OF NEGLIGENCE, AS DISTINGUISHED FROM THE EVIDENTIARY FACTS LEADING TO IT, IS A CONCLUSION OF LAW OR A FINDING OF FACT, SUCH CONFLICT SHOULD BE RESOLVED BY THIS COURT.

The decision below should be reviewed because the Sev-

enth Circuit Court of Appeals has rendered a decision in conflict with decisions of other Circuit Courts of Appeals on the same matter.

A conflict has developed among the circuits as to whether a judge's determination of negligence is a conclusion of law, fully reviewable upon appeal, or a finding of fact as contemplated by Rule 52(a) of the Federal Rules of Civil Procedure, which can be set aside only if clearly erroneous.

It has been held in the Second Circuit that:

> "A Judge's determination of negligence, as distinguished from the evidentiary facts leading to it, is a conclusion of law freely reviewable on appeal and not a finding of fact entitled to the benefit of the 'unless clearly' erroneous rule."
>
> *Gediman* v. *Anheuser-Busch, Inc.* (2nd CCA, 1962), 299 F. 2d 537, 542.

The Fourth Circuit has also adhered to the principle set out in the *Gediman* case.

Olah v. *S. S. Jaladurga* (4th CCA, 1965), 343 F. 2d 457.

The Sixth and Ninth Circuits have held that determination of negligence is a finding of fact not to be overturned unless "clearly erroneous."

Pacific Tow. Boat Co. v. *States Marine Corp. of Dela.* (9th CCA, 1960), 276 F. 2d 745;

Imperial Oil, Limited v. *Drlik* (6th CCA, 1956), 234 F. 2d 4.

The conflict has been demonstrated in a recent case arising in the Court of Appeals for the District of Co-

lumbia. In *Socash* v. *Addison Crane Company* (1965, USCA, DC), 346 F. 2d 430, the Court affirmed the lower court with the main opinion holding that the determination of negligence was a finding of fact and not to be overturned unless "clearly erroneous," whereas the concurring opinion took the position that the determination of negligence was a conclusion of law and freely reviewable.

A definite conflict exists among the Circuits on the question of whether the determination of negligence is a conclusion of law or a finding of fact. The distinction is a fundamental concept necessary to the proper functioning of the Federal judicial system. The vast amount of negligence litigation pending in the Federal Courts makes it imperative that this conflict be resolved by this Court.

The majority decision of the Seventh Circuit in this case is in direct conflict with the Second Circuit, Fourth Circuit and the concurring opinion of the recent case in the Court of Appeals for the District of Columbia. Uniformity of opinion on such an important principle of law in the Federal system is vital. This conflict should be resolved by this Court.

IV

WHERE A COURT OF APPEALS REFUSES TO RESOLVE A CONFLICT AS TO AN IMPORTANT RULE OF LAW EXISTING BETWEEN PANELS OF JUDGES OF THE CIRCUIT, THIS COURT MAY EXERCISE ITS SUPERVISING POWER AND TAKE REMEDIAL ACTION.

The decision below should be reviewed because there exists within the Seventh Circuit Court of Appeals a conflict as to whether the determination of negligence is an

evidentiary fact not subject to review or whether it is a conclusion of law which will permit meaningful review.

In *U.S.* v. *Rogers* (7th CCA, 1965), 345 F. 2d 357, 359, the Seventh Circuit Court of Appeals, recognized that the determination of negligence is a conclusion of law by citing with approval the Second Circuit *Gediman* case. In the instant case the Seventh Circuit Court of Appeals held that the determination of negligence is an evidentiary finding of fact and not subject to review. Hence, the conflict which exists between the Circuits also exists between panels of the Seventh Circuit.

Although differences within a circuit are normally to be resolved by the Court of Appeals, if it refuses to do so no other remedy exists than for this Court to exercise its supervising power. This court has held that a conflict within a circuit on an important question is sufficient reason to exercise this court's jurisdiction.

Dickinson v. *Petroleum Conversion Corp.* (1950), 338 U. S. 507, 94 L. Ed. 299.

The Petitioners raised this point in their Petition for Rehearing *En Banc,* but the Seventh Circuit Court of Appeals refused to resolve the conflict.

V

THE PROPER CONSTRUCTION OF "SLOW SPEED" STATUTES WHICH AFFECT CITIZENS OF THE UNITED STATES WHILE OPERATING MOTOR VEHICLES IN THIRTY-SIX DIFFERENT STATES IS A MATTER WARRANTING THE ATTENTION OF THIS COURT.

The decision below should be reviewed because the con-

struction placed upon the Indiana slow speed statute by the District Court, and approved by the Court of Appeals, affects vehicular traffic throughout the United States. Thirty-six states have a slow speed statute similar to the Indiana statutes.[1] Proper construction of such statutes is important in light of the constant growth of interstate motor vehicle traffic. With such an important question before the Court, the matter was decided with a shocking result. The trial court found as a matter of law that a tractor-trailer going 20 to 30 miles per hour in the outside lane of a four-lane, divided highway was in violation of this statute proximately causing the collision. This finding was made even though there were fourteen (14) feet of clear, unobstructed highway for the bus to use to pass. This finding was made even though the tractor-trailer was traveling at the extreme right-hand side of the highway. This finding was made even though the tractor-trailer was displaying nine (9) red lights on the rear. But even more shocking, this finding determined that by going 20 to 30 miles per hour, the normal and reasonable movement of traffic that was impeded was a bus going 75 miles per hour, which was 10 miles an hour above the speed limit.

If this decision is correct, then every vehicle slowing down for turns, hills or any other reason is in violation of a slow speed statute, if operating in one of the 36 states having such statutes. It is of national interest that the Indiana statute (which is similar or identical to the statutes of 36 states) be construed so as to protect the rights and determine the obligations of all motor vehicle operators.

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[1] See Appendix B, p. 14a for list of States and statute citations.

CONCLUSION

When all of the evidence in this case is considered, the judgment of the trial court is clearly erroneous. Yet, the Seventh Circuit Court of Appeals failed to grant relief to the Petitioners because the majority failed to grasp the concept that clearly erroneous judgments should be reversed. This result is obviously reached because the appeals court misunderstood the principles laid down by this Court that findings of fact are reviewable if not supported by substantial evidence of probative value; and that conclusions of law are always reviewable.

The opinion of the Seventh Circuit Court of Appeals added to the confusion in determining that negligence is an evidentiary fact, and not a legal conclusion. With this holding, there is a definite split among the Circuits on this fundamental question. The confusion is compounded as the Seventh Circuit has itself held both ways on this question. Clarification of such an important question is vital, particularly since there has been such a tremendous increase in the number of negligence cases. The need for clarification in the instant case is even more important because of the impact of this decision throughout the country.

The issuance of a Writ of Certiorari by this Court is necessary for the ultimate administration of justice.

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Appendix A

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois
Tuesday, January 11, 1966

No. 15304

Before

Hon. *JOHN S. HASTINGS, Chief Judge*
Hon. *F. RYAN DUFFY, Circuit Judge*
Hon. *KENNETH P. GRUBB, District Judge* (Senior)

JOHN ANTHONY MARKIEWICZ, a minor etc., et al.,
Plaintiffs-Appellees,
v.
THE GREYHOUND CORPORATION, et al.,
Defendants,
CONTRACT CARRIERS, INC., et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED, with cost, and interest, in accordance with the opinion of this Court filed this day.

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

No. 15304 SEPTEMBER TERM AND SESSION, 1965

JOHN ANTHONY MARKIEWICZ, a minor by his father and next friend, EDWARD MARKIEWICZ, and EDWARD MARKIEWICZ, and JENNIE MARKIEWICZ,
Plaintiffs-Appellees,

v.

THE GREYHOUND CORPORATION, ROBERT L. SCHLAGENHAUF, NATIONAL LEAD COMPANY,
Defendants,

CONTRACT CARRIERS, INC., and JOSEPH L. McCORKHILL,
Defendant-Appellants.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

JANUARY 11, 1966

Before HASTINGS, *Chief Circuit Judge,* DUFFY, *Circuit Judge,* and GRUBB, *Senior District Judge.*

GRUBB, *Senior District Judge.* This diversity of citizenship action to recover damages for personal injuries and related expenses sustained by plaintiffs was tried to the court. Final judgment was entered for the plaintiffs and against defendants, The Greyhound Corporation; Robert L. Schlagenhauf; Contract Carriers, Inc.; and Joseph L. McCorkhill. The appeal is taken by Contract Carriers, Inc. and McCorkhill only.

On July 13, 1962, plaintiffs, John Anthony Markiewicz and Jennie Markiewicz, were passengers riding on a Greyhound bus operated by Schlagenhauf in the eastbound lanes of United States Highway 40, a four-lane divided highway, between Stilesville and Belleville, Indiana. About 1:05 A.M., the bus struck the left rear of a Trailmobile trailer being pulled by a 1960 G.M.C. tractor operated by McCorkhill, as a driver for Contract Carriers, Inc.

The court found that the G.M.C. tractor had experienced loss of ability to produce normal forward speed for over 100 miles before it reached the point of collision. McCorkhill had made several stops to investigate the cause of the power failure and had contacted the dispatcher of Contract Carriers, Inc. at Anderson, Indiana, advising him that the maximum forward speed of his vehicle was about 30 miles per hour. The dispatcher authorized McCorkhill to operate the unit to its destination. McCorkhill was unable to effect any repair and proceeded eastward on Highway 40 at a speed approximating 20 to 30 miles per hour. Immediately prior to the collision, the rear of the trailer carried 9 red lights which were all properly lighted. At all times in question McCorkhill operated the tractor-trailer in the southernmost lane of the two lanes of Highway 40 designated for eastbound traffic.

The cause of the slowdown of McCorkhill's vehicle was a progressive accelerator breakdown which diminished the amount of acceleration progressively. Before this collision, Contract Carriers, Inc. had experienced this type of defect with all of the tractors of this type and provided a spare part in the glove compartment for emergency repair.

Schlagenhauf, the operator of the Greyhound bus, had overtaken an eastbound trailer-tractor operated by one Louie L. Stone in the southernmost lane of Highway 40.

After passing the Stone vehicle, Schlagenhauf operated his right turn signals, executed lighting courtesy signals to Stone, turned the bus from the northernmost lane to the southernmost lane in front of the Stone vehicle, and reviewed the passed vehicle in his rear view mirror. He observed red lights in front of him and started to return the bus to the northernmost lane to pass the vehicle. The collision occurred in the southernmost lane when the right front parts of the bus engaged the left rear of the trailer. Less than 10 seconds elapsed between the time Schlagenhauf passed the Stone vehicle and the instant of the impact.

At the time of and immediately prior to the collision, Schlagenhauf operated the bus at 75 miles per hour. He did not correctly associate the proximity of the red lights he observed in front of him after passing the Stone vehicle and did not correctly compare his speed with the speed of said lights during and immediately after passing the Stone vehicle. Schlagenhauf did not reduce the speed of the bus or apply the brakes prior to the collision. He did not recognize that a collision was imminent until it was too late to avoid it, although he attempted ineffectively to turn the steering wheel of the bus further to the left when he realized the situation.

At the time in question, Highway 40 between Stilesville and Belleville, Indiana, and particularly at the point of the collision, was straight and level to rolling. The adjacent property was devoted to farming with a minimum of farm residential dwellings, filling stations, and intersecting county highways. Posted speed limits authorized speed of buses at 65 miles per hour and speed of tractor-trailer units at 55 miles per hour. The eastbound traffic was normal to light. Road and weather conditions were optimal for that hour of traveling on a public highway.

The District Court made this finding:

> "11. The low speed of the tractor-trailer unit as determined in these findings of fact impeded the normal and reasonable movement of traffic at the time and place in question and its slow speed was deceptive and misleading to the safety of those operators approaching from the rear of the unit including the operator of the bus and Mr. Stone, the operator of the other tractor-trailer, who was barely able to avoid the colliding vehicles."

The court concluded that Schlagenhauf, and, by application of the Indiana rule of *respondeat superior*, The Greyhound Corporation were guilty of causal negligence by operating the bus at an excessive speed and by failing to keep a reasonable lookout for other vehicles using the highway. The court further concluded that McCorkhill, and, by application of the doctrine of *respondeat superior*, Contract Carriers, Inc. were guilty of causal negligence in the operation of the tractor-trailer at such a low speed as to deceive other operators on the highway and to impede the normal and reasonable movement of vehicular traffic, in violation of Burns' Indiana Statutes, 1962 Cumulative Supplement, Volume 8, Part 2, § 47-2006; in failing to perform the common law duty of ordinary care by operating the tractor with knowledge that it did not have sufficient power to tow the trailer at sufficient speed to avoid impeding the normal flow of traffic, and in towing the trailer under these circumstances without giving warning to vehicles approaching from the rear as to its low speed and presence on the road by flares, extra lamps, or other brightly illuminated devices.

Section 47-2006 of Burns' Indiana Statutes, 1952 Cumulative Supplement, Volume 8, Part 2, provides as follows:

> "No person shall drive a motor vehicle at such a low speed as to impede the normal and reasonable movement of traffic, except when reduced speed is necessary for safe operation, or in compliance with law."

What constitutes illegal "low speed" under the statute involves a question of fact for the trier of the cause to be determined under the circumstances of the case. *Pohlman* v. *Perry*, 122 Ind. App. 222, 103 N. E. 2d 911, 915 (1952).

Significant factors to be considered in the instant case are the time and opportunity available to Schlagenhauf for observing and evaluating the relative position and the speed of the Contractor Carriers, Inc. vehicle. The evidence shows that Schlagenhauf approached from the rear. His view of this vehicle had been obstructed by the intervening tractor-trailer operated by Stone. On clearing the Stone tractor-trailer, Schlagenhauf reached a position from which he could observe the lights mounted on the rear of the trailer towed by the Contract Carriers, Inc. tractor. At this time, his attention was also directed to the vehicle he had just passed. Schlagenhauf's belief that the lights ahead were no cause of concern to him and his action in returning the bus to the southernmost lane clearly indicate that he made an erroneous assessment of the situation.

Although the mistake in judgment was that of Schlagenhauf, it does not follow that the collision, as a matter of law, must necessarily be attributed solely to him. His conduct in passing and giving attention to the Stone vehicle may be characterized as normal incidents of highway travel. Further, the normal flow of traffic does not exclude a situation in which the operator of one vehicle may have but a few seconds in which to arrive at an evaluation as to the speed and relative location of another vehicle on the highway. Under such circumstances, a vehicle proceeding

at an unusually slow speed, that is, unusual in light of the conditions of the road, the hour of travel, the amount of traffic on the highway, and the type of vehicle involved, may, by the very unexpectedness of its speed, mislead the operator of another vehicle who lacks opportunity for a more prolonged observation.

Schlagenhauf's negligence in the operation of the bus at an excessive speed and in failing to maintain a proper lookout unquestionably contributed to the impairment of his judgment. In light of his limited opportunity for observation of the Contract Carriers, Inc. vehicle, his error may reasonably be found to have been induced also by the fact that the tractor-trailer was being operated at an unusually low speed—possibly as low as 20 miles per hour—of which its lights and general appearance on the highway gave no indication.

We are not here concerned with a comparison of the negligence of the respective tortfeasors, or with the problem of intervening or superseding causes. The issue before the court is whether the record supports a finding that the speed at which the Contract Carriers, Inc. vehicle was being operated constituted causal negligence as to the plaintiffs in that it misled and deceived the driver of the bus, and impeded the flow of traffic on the highway. This finding will not be disturbed on appeal if it may be sustained upon a rational view of all of the evidence including all reasonable inferences of which the testimony is susceptible. *Smoczynski* v. *United States,* 352 F. 2d 44, 47 (7th Cir. 1965).

Consideration of the record discloses that the operation of the Contract Carriers, Inc. vehicle in the manner and under the circumstances shown here may be found to have contributed to Schlagenhauf's error in judgment as to the

relative position and speed of the vehicle, and that the operation of said vehicle thereby constituted a concurring, substantial factor, together with the negligence of the driver of the bus, in bringing about the harm to plaintiffs. The standards of causal negligence under Indiana law are met thereby. *Huey* v. *Milligan,* 242 Ind. 93, 175 N. E. 2d 698, 703 (1961). The manner of operation of said vehicle as determined by the district court further may be deemed to have impeded the normal and reasonable flow of traffic in violation of § 47-2006, Burns' Indiana Statutes.

The fact that an unobstructed lane of travel, that is, the northernmost of the eastbound lanes, may have been available to Schlagenhauf, does not as a matter of law obviate causal negligence which contributed to the bus driver's determination not to follow the unobstructed lane. See *Seaton* v. *Spence,* 215 Cal. App. 761, 30 Cal. Rptr. 510 (1963). Appellants' further theory that the collision would have occurred regardless of the speed of the tractor-trailer because of Schlagenhauf's conduct presents an area of speculation which has no support in the record and is not necessarily to be inferred from the evidence in the case.

The additional specifications of causal negligence found by the district court rest on the validity of the finding of causal negligence in the operation of the tractor-trailer at such deceptively low speed as to impede the flow of traffic. It is undisputed that the operator of the Contract Carriers, Inc. vehicle proceeded upon the highway with knowledge of the impairment of its capacity for attaining reasonable speed and without providing said vehicle with additional lights or warning devices to alert others to this condition. This conduct may be deemed to constitute negligence. It is unnecessary to decide the question whether or not this negligence must also be deemed to constitute additional independent instances of causal negligence since the affirm-

ance of the determination as to the violation of the Indiana low speed statute suffices to sustain the judgment.

The real issue on this appeal concerns the question of appellants' causal negligence. Whether or not, under the circumstances revealed by the record, the operation of the Contract Carriers, Inc. tractor-trailer was at such a low speed as to deceive others upon the highway and to constitute an impediment to traffic must be determined by the trier of facts. It is the function of the trier of facts to weigh the evidence presented by oral testimony in the case. *Koehler* v. *Ellison*, 226 F. 2d 682, 686 (7th Cir. 1955). All reasonable inferences of which the evidence of record is susceptible drawn by the trier of facts must be accepted by the reviewing court regardless of whether its members might have reached opposing inferences. *Alster* v. *Alster and Associates, Inc.*, 319 F. 2d 54, 55 (7th Cir. 1963). The findings of the district court, serving as the trier of facts in this case, as to causal negligence by a deceptively low speed and by impeding traffic has sufficient support in the record. The judgment is AFFIRMED.

DUFFY, *Circuit Judge*, dissenting.

I respectfully dissent. At the time of the collision, the tractor-trailer was traveling entirely within the right-hand lane of the two east-bound traffic lanes. Under Indiana law, this is where the tractor-trailer should have been. There were nine red lights lit on the rear of the trailer visible for a distance of some 500 feet or more. These lights were in compliance with Indiana statutes and interstate commerce regulations. The tractor-trailer was traveling on a divided four-lane highway which, at the point of the accident, was straight and of level to rolling terrain. It had wide shoulders. The weather was clear and dry with

good visibility. The Court found the tractor-trailer had been traveling at a speed of 20 to 30 miles per hour, although the probative evidence shows the speed to have been 25 to 30 miles per hour.[1]

I am convinced that if the tractor-trailer had been traveling at a speed of 30 to 40 miles per hour, or even at a higher speed, the collision would still have occurred. It is of no importance whether a faulty accelerator part was the reason for the 20 to 30 mile speed, or whether the tractor-trailer was slowing down to turn into the next filling station. In this case, the cause of the tractor-trailer's speed cannot be a proximate cause of the collision.

The bus driver, Schlagenhauf, had the entire inner east-bound lane in which to pass the tractor-trailer. This lane was clear, unobstructed, and about fourteen feet in width.

The majority opinion affirms the District Court in holding the driver of the tractor-trailer violated the Indiana statute which provides—"No person shall drive a motor vehicle at such a low speed as to impede the normal and reasonable movement of traffic, except when reduced speed is necessary for safe operation, or in compliance with the law." Burns' Indiana Statutes Annotated (1952 Replacement) (Supp) § 47-2006.

It is apparent that a slow moving vehicle can impede the normal and reasonable movement of traffic on a 2-lane highway, but it is beyond my comprehension how this can be done by a vehicle traveling in the extreme right-hand lane of a four-lane highway where the second east-bound lane is clear and free from all obstruction. These are the circumstances present in this case.

---

[1] The evidence in this case consists mainly of depositions and other documentary evidence.

The District Court also suggested the tractor-trailer should have had warning lights in addition to the nine which were lit. However, the Indiana statutes make it clear that vehicles proceeding at less than the normal speed of traffic are specifically authorized to continue operating upon the highways without additional warning lights as long as they operate as close as possible to the right-hand side of the highway, unless the vehicle's speed is less than 20 miles per hour. That is not the situation in the case at bar.

There was no minimum speed limit in effect at the time and place in question. The highway was not an expressway, freeway, or any other type of limited access highway.

The collision occurred because of the bus driver's lack of look-out. The bus was traveling at a speed of about 75 miles an hour. In my judgment, the failure of Schlagenhauf, the driver of the bus, to keep a proper look-out was the sole, active, direct, independent and effective cause of the plaintiffs' injuries. *Hayes Freight Lines* v. *Wilson,* 226 Ind. 1, 77 N. E. 2d 580; *Huey* v. *Milligan,* 242 Ind. 93, 175 N. E. 2d 698.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

Thursday, March 24, 1966

No. 15304

Before

Hon. *JOHN S. HASTINGS, Chief Judge*

Hon. *F. RYAN DUFFY, Circuit Judge*

Hon. *ELMER J. SCHNACKENBERG, Circuit Judge*

Hon. *WIN G. KNOCH, Circuit Judge*

Hon. *LATHAM CASTLE, Circuit Judge*

Hon. *ROGER J. KILEY, Circuit Judge*

Hon. *LUTHER M. SWYGERT, Circuit Judge*

JOHN ANTHONY MARKIEWICZ, a minor, etc., et al.,
Plaintiffs-Appellees,
v.
JOSEPH L. McCORKHILL and CONTRACT CARRIERS, INC.,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

On consideration of the petition of defendants-appellants, Contract Carriers, Inc. and Joseph L. McCorkhill, for rehearing *en banc* of the above case, together with the answers of the plaintiffs-appellees in opposition thereto, and the supporting brief of American Trucking Associations, Inc., amicus curiae, and the various answers thereto;

IT IS ORDERED by the Court that the petitions of American Trucking Associations, Inc. and United Farm Bureau Insurance Company of America to file briefs, as amicus curiae, in support of the petition for rehearing *en banc,* be and the same are hereby denied; and

IT IS FURTHER ORDERED by the Court that the petition of defendants-appellants, Contract Carriers, Inc. and Joseph L. McCorkhill, for a rehearing *en banc* be and the same is hereby denied.

Duffy, Circuit Judge, voted to grant the petition for rehearing *en banc.*

Appendix B

Alabama—Alabama Statutes, Tit. 36, Sec. 58 (2);

Arizona—Ariz. R. S. Sec. 28-704;

Arkansas—Ark. Stat. Anno. (1947), Sec. 75-604;

California—West's Cal. Code Anno., Sec. 22400;

Colorado—Colo. R. S. 1963, Sec. 13-5-35;

Connecticut—Conn. G. S. Anno., Sec. 14-220;

Delaware—Dela. Code Anno., Sec. 4171;

Florida—Fla. Stat. Anno., Sec. 317.22 (6);

Georgia—Code of Ga. Anno., Sec. 68-1629;

Idaho—Idaho Code, Sec. 49-704;

Illinois—S.-H. Ill. Stats. Anno. 95½, Sec. 148;

Indiana—Burns' Ind. Stats. Anno., 47-2006;

Iowa—Ia. Code Anno., Sec. 321-294;

Kansas—Kan. Stats. Anno., Sec. 8-534;

Maine—Maine R. S. Anno., Sec. 29-1253;

Minnesota—Minn. Stats. Anno., Sec. 169.15;

Missouri—Vernon's Anno. Stats. of Missouri, Sec. 304.611;

Nebraska—R. S. of Nebr. 1943, Sec. 39-723.02;

Nevada—Nev. R. S., Sec. 484.093;

New Hampshire—N. H. R. S. Anno., Sec. 262-A:57;

New Jersey—New Jersey Stats. Anno., Sec. 39:4-97.1;

New Mexico—N. M. Stats. 1953 Anno., Sec. 64-18-4;

New York—McKinney's Consol. Laws of N.Y. Anno., Sec. 1181;

North Carolina—Gen. Stats. of N.C. Anno., Sec. 20-141 (h);

North Dakota—N.D. Century Code Anno., Sec. 39-09-02, Sec. 39-09-01;

Ohio—Sec. 4511.22 Baldwin's Revised Ohio Code & Serv. (6307-22);

Oklahoma—Okla. Stats. Anno. 47, Sec. 11-804;

Oregon—Ore. R. S., Sec. 483.112;

Pennsylvania—Purdon's Penna. Stat. 75-1002;

Rhode Island—General Laws of Rhode Island 31-14-9;

S. Carolina—Code of Laws of S. C., Sec. 46-372;

Tennessee—Tennessee Code 59-854;

Utah—Utah Code 41-6-49;

Virginia—Code of Virginia, Sec. 46.193(g);

W. Virginia—Code of W. Va., Sec. 1721 (335a) (3a);

Wisconsin—West's Wisconsin Stats. Anno., Sec. 85-40(6);

Wyoming—Wyoming Stats.—1957, Section 31-133.

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUL 16 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

No. 264

CONTRACT CARRIERS, INC. AND JOSEPH L. McCORKHILL,

Petitioners,

vs.

JOHN ANTHONY MARKIEWICZ, A MINOR BY HIS FATHER AND NEXT FRIEND, EDWARD MARKIEWICZ, AND EDWARD MARKIEWICZ AND JENNIE MARKIEWICZ, AND THE GREYHOUND CORPORATION AND ROBERT L. SCHLAGENHAUF,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS JOHN ANTHONY MARKIEWICZ, EDWARD MARKIEWICZ AND JENNIE MARKIEWICZ IN OPPOSITION.

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IN THE

Supreme Court of the United States

October Term, 1966.

No. 264.

CONTRACT CARRIERS, INC. AND JOSEPH L. McCORKHILL,

Petitioners,

vs.

JOHN ANTHONY MARKIEWICZ, A MINOR BY HIS FATHER AND NEXT FRIEND, EDWARD MARKIEWICZ, AND EDWARD MARKIEWICZ AND JENNIE MARKIEWICZ, AND THE GREYHOUND CORPORATION AND ROBERT L. SCHLAGENHAUF,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS JOHN ANTHONY MARKIEWICZ, EDWARD MARKIEWICZ AND JENNIE MARKIEWICZ IN OPPOSITION.

Respondents, John Anthony Markiewicz, Edward Markiewicz and Jennie Markiewicz, respectfully pray that the petition herein for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Seventh Circuit entered in the entitled case on March 24, 1966, be denied.

OPINION BELOW.

The District Court for the Southern District of Indiana rendered judgment without opinion. The opinion of the United States Court of Appeals for the Seventh Circuit affirming the judgment is reported in 358 F. 2d 26.

JURISDICTION.

The grounds on which the jurisdiction of the Court is involved are properly set forth in the Petition.

QUESTIONS PRESENTED.

1. Did the Seventh Circuit Court of Appeals fulfill its obligation as a reviewing Court in affirming the judgment of the lower court?

2. Did the Seventh Circuit Court of Appeals depart from the accepted and usual course of judicial review?

3. Should this Court review by certiorari evidence or inferences drawn from it bearing on the issues of causation and negligence?

4. Should this Court review by certiorari the judgment of the United States Court of Appeals for the Seventh Circuit affirming the Judgment of the District Court for the Southern District of Indiana under the facts here asserted?

5. Did the Seventh Circuit Court of Appeals fulfill its obligation as a reviewing Court in reviewing the findings of the District Court and the record and determining said findings had sufficient support in the record?

6. Did the Seventh Circuit Court of Appeals fulfill its obligation as a reviewing Court in determining that correct legal standards had been applied by the trial judge?

STATUTES AND FEDERAL RULES INVOLVED.

Irrespective of the assertion of the Petitioners, only the following Statutes and Rules are involved here:

§47-2006 Burns' Indiana Statutes Annotated (1952 Replacement Supp.):

> "No person shall drive a motor vehicle at such a low speed as to impede the normal and reasonable movement of traffic, except when reduced speed is necessary for safe operation, or in compliance with the law."

Rule 52(a) Federal Rules of Civil Procedure:

> "(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b)."

Rule 19. Supreme Court of the United States Revised Rules.

> "Considerations governing review on certiorari.
>
> 1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important

reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decision of this court.

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, or of any other court whose determinations are by law reviewable on writ of certiorari."

STATEMENT OF FACTS.

The Respondents Markiewicz were passengers on a Greyhound Bus operated by Robert L. Schlagenhauf, when it became involved in a collision with a tractor-trailer unit operated by Joseph L. McCorkhill, an employee of Contract Carriers, Inc. The collision occurred on July 13, 1962, at about 1:05 A.M. on U. S. Highway 40, in the State of Indiana, at nighttime—both vehicles were traveling in an easterly direction when the right front of the bus collided with the left rear of the tractor-trailer unit. The highway at the point of collision was a four-lane highway with the

two eastbound lanes separated from the two westbound lanes by a grass divider.

McCorkhill had experienced acceleration problems for 100 miles prior to the accident. The farther the vehicle was operated, the slower the vehicle went. The speed of the McCorkhill vehicle at the time of the occurrence was 20-30 miles per hour. McCorkhill was advised by his employer to have his vehicle repaired, but continued on. McCorkhill said he was advised to continue on. The cause of the inability to increase forward speed was due to a defective member of the accelerator which had been experienced by Contract Carriers and McCorkhill before, and by reason of such experience Contract Carriers had provided a replacement part in the glove compartment of the vehicle. McCorkhill did not replace the defective part with the spare furnished and did not equip the vehicle with any warning devices of his continuous slow speed. Schlagenhauf, operating the bus, approached from the rear a tractor-trailer unit operated by witness Louie L. Stone, signaled his intention to pass, pulled into the passing lane and proceeded to pass. Upon passing the Stone vehicle Schlagenhauf signaled he was returning to the right-hand lane, saw red lights down the road ahead of him, started to return to the right-hand lane, saw the left rear of the Contract Carriers unit, swerved hard left and collided with about two feet of the left rear of the Contract Carriers vehicle.

The cause was initially submitted in the District Court to a jury, but upon the stipulation of all parties establishing the damages to be recovered by the respondents, providing responsibility be estabilshed, the cause was withdrawn from the jury and submitted to the Court with respect to liability issues only. Findings of fact and conclusions of law were made and judgments entered against Contract Carriers, Inc., Joseph L. McCorkhill, Robert L. Schlagenhauf, and The Greyhound Corporation. Petition-

ers, Joseph L. McCorkhill and Contract Carriers, Inc., appealed to the Seventh Circuit Court of Appeals. Respondents, Robert L. Schlagenhauf and The Greyhound Corporation, did not appeal the judgments rendered against them.

A three-judge panel of the Seventh Circuit Court of Appeals affirmed the lower court's decision with Judge Duffy dissenting. A Petition for Rehearing En Banc was filed and denied by the Court sitting en banc by a six to one decision with Judge Duffy dissenting.

REASONS FOR DENYING THE WRIT OF CERTIORARI.

I.

This Court Should Not Review by Certiorari Evidence or Inferences Drawn From It Bearing on the Issues of Causation and Negligence Nor Review Concurrent Findings of Fact of Two Courts Below in Absence of a Very Obvious and Exceptional Showing of Error.

This is an ordinary negligence case giving rise, as is the case in every vigorously litigated case of this type, to a conflict in the evaluation of evidence. The only real controversy here is an appraisal of facts on which this Court is being asked to substitute its assessment for that of the two courts below.

What the Petitioners seek of this Court is a trial *de novo* —this Court sitting as the trial judge, as fact finder, reviewing the evidence, drawing inferences therefrom and substituting this Court's interpretation of the facts for the interpretation concurred in and applied by the District Court and the Seventh Circuit Court of Appeals. That this is what the petitioners seek is made clear in Paragraph I of the Petitioners' Argument at page 10, wherein the Petitioners request this Court "to consider the facts and apply the law."

Jurisdiction under 28 USC, Section 1254(1) was not conferred upon this Honorable Court to afford the defeated party in the Court of Appeals another hearing. *Magnum Import Co.* v. *De Spaturno Coty.* (1922), 262 U. S. 161. This Court is not the place to review a conflict of evidence. *NLRB* v. *Pittsburgh S. S. Co.*, 340 U. S. 498, 503, or to review evidence and discuss specific facts. *United States of*

America v. *James J. Johnson*, 268 U. S. 220, 227; *General Talking Pictures Corp.* v. *Western E. Co., Inc.*, 304 U. S. 175, 178.

Negligence cases are the most common type of litigation filed in state and federal courts today. State and federal dockets are bursting with such litigation. No scientific or precise method can be devised to test the sufficiency of the evidence in a negligence case. If this Court undertook to sit as fact finder, weigh the evidence, draw inferences and review negligence cases, this Court would destroy the entire appellate review structure by opening Circuit Court decisions to attack as a matter of course by every dissatisfied party and reduce this Court's already crowded docket to hopelessness. Jurisdiction of this Court pursuant to Rule 19 of the Rules of the Supreme Court must be preserved for those cases for which there are special and important reasons for the exercise of the Court's discretion. Cases involving only the interpretation of facts bearing on the issues of causation or negligence are outside the consideration for which this Court exercises its discretionary jurisdiciton.

The Petitioners cite *McAllister* v. *U. S.* (1954), 348 U. S. 19 as authority for this Court reviewing the evidence in this case. However, in McAllister the Court was not reviewing the concurrent findings of two courts below and thus held where the Court of Appeals reverses the judgment of the District Court the Supreme Court sits in the same position as the Court of Appeals, and the question is whether the findings of the District Court are clearly erroneous. In the case at hand this Court sits in the position of reviewing the concurrent findings of the District Court and the Court of Appeals. As was stated in *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.* (1940), 336 U. S. 271, 275, "a court of law, such as this Court is, rather than a

Court for correction of errors in fact finding, cannot undertake to review the concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."

The Petitioners have wholly failed to make a showing of obvious and exceptional error and have wholly failed to state any important or special reason why this Court should review on certiorari the judgment of the Circuit Court of Appeals.

II.

The Seventh Circuit Court of Appeals Followed Accepted and Usual Course of Judicial Proceedings in Affirming the District Court.

The Petitioners assert the Court of Appeals departed from the accepted and usual course of judicial procedure in that the Court of Appeals "refused to review the findings of fact to determine if they were supported by the quantity and quality of evidence required by federal procedure" (Petition page 11), and failed to review the legal standard applied by the trial court (Petition page 15).

First, what was the obligation of the Court of Appeals reviewing the lower court judgment?

We submit the questions before the Court of Appeals were: (1) Are the trial court's findings clearly erroneous? (2) Are the trial court's findings supported by the evidence and reasonable inferences therefrom? (3) Did the trial court correctly apply the law?

In the case at bar the findings of the District Court which are attacked by the Petitioners and were made contested issues on appeal were founded essentially upon the testimony of two witnesses, Joseph L. McCorkhill and Robert L. Schlagenhauf, both of whom were the key witnesses in the cause and both of whom appeared in open court before

the trial judge for a total of two and one-half days of intensive oral examination. It was the duty of the trial court to weigh the evidence and determine the credibility of the witnesses. Such was not the function of the reviewing court.

Koehler v. *Ellison,* (C. A. 7th, 1955), 226 F. 2d 682, 685.

Cuthill v. *Ortman-Miller Machine Co.,* (C. A. 7th, 1957), 249 F. 2d 43, 47.

For the Court of Appeals to substitute its judgment on the oral evidence would have made the Appellate Court the trier of the facts, which the Court of Appeals had previously determined was not its function.

Wood v. *Reznik,* (C. R. 7th, 1957), 248 F. 2d 549.

Wolverine Insurance Co. v. *Eldridge,* (C. A. 7th, 1964), 326 F. 2d 748.

The function of the Court of Appeals was to determine whether the findings of the District Court were clearly erroneous,

McAllister v. *U. S.,* (1954), 348 U. S. 19.

Leatherman v. *Gateway Transp. Co.,* (C. A. 7th, 1964), 331 F. 2d 241, 244.

Clark v. *Travelers Indemnity,* (C. A. 7th, 1963), 313 F. 2d 160.

and in fulfilling that function the Court of Appeals should have given due regard to the opportunity of the trial judge to judge the credibility of the witnesses, should not reject any reasonable inference drawn by the trial judge and the trial judge's findings should not be disturbed unless they could not be sustained upon any rational view of all the evidence or unless the law was incorrectly applied.

Smoczynski v. *United States,* (C. A. 7th, 1965), 352 F. 2d 44, 47.

Alster v. *Alster & Associates, Inc.*, (C. A. 7th, 1963), 319 F. 2d 54.

First National Bank of Colorado Springs v. *McGuire* (C. A. 7th, 1950), 184 F. d 620.

Did the Court of Appeals fulfill its function?

From a review of the Opinion of the Court of Appeals (Petition PP. 2a-9a) it is apparent that the reviewing court in concurring with the judgment of the trial court carefully reviewed the record, found the findings of the trial judge had sufficient support in the record, and further found the trial judge had applied the proper legal standards as determined by Indiana law.

The District Court had found:

> "11. The low speed of the tractor-trailer unit as determined in these findings of fact impeded the normal and reasonable movement of traffic at the time and place in question and its slow speed was deceptive and misleading to the safety of those operators approaching from the rear of the unit including the operator of the bus and Mr. Stone, the operator of the other tractor-trailer, who was barely able to avoid the colliding vehicles."

and concluded that McCorkhill and Contract Carriers, Inc. had failed to comply with the standard established by Burns' Indiana Statutes Annotated, Section 47-2006. (Opinion of Ct. of App.—Petition P. 5a).

Upon a review of the evidence, as outlined by the Court of Appeals (Petition P. 6a), the Court of Appeals stated:

> "Although the mistake in judgment was that of Schlagenhauf, it does not follow that the collision, as a matter of law, must necessarily be attributed solely to him . . . Further, the normal flow of traffic does not exclude a situation in which the operator of one vehicle may have but a few seconds in which to arrive at an evaluation as to the speed and relative location

of another vehicle on the highway. Under such circumstances, a vehicle proceeding at an unusually slow speed, that is, unusual in light of the conditions of the road, the hour of travel, the amount of traffic on the highway, and the type of vehicle involved, may, by the very unexpectedness of its speed, mislead the operator of another vehicle who lacks opportunity for a more prolonged observation . . . In light of his limited opportunity for observation of the Contract Carriers, Inc. vehicle, his error may reasonably be found to have been induced also by the fact that the tractor-trailer was being operated at an unusually low speed—possibly as low as 20 miles per hour—of which its lights and general appearance on the highway gave no indication." (Petition PP. 6a-7a).

The Court of Appeals also concluded upon a review of the evidence, "Consideration of the record discloses that the operation of the Contract Carriers, Inc. vehicle in the manner and under the circumstances shown here may be found to have contributed to Schlagenhauf's error in judgment as to the relative position and speed of the vehicle, and that the operation of said vehicle thereby constituted a concurring, substantial factor, together with the negligence of the bus, in bringing about the harm to plaintiffs." (Petition PP. 7a-8a.)

The Court of Appeals further found that the Contract Carriers, Inc. vehicle proceeding upon the highway with knowledge of the impairment of its capacity for attaining reasonable speed and without providing said vehicle with additional lights or warning devices to alert others to this condition may be deemed to constitute negligence. (Petition P. 8a.)

Thus the Court concluded upon the Court's own thorough review of the record that the findings of the District Court had sufficient support in the record.

Did the Court of Appeals review the legal standard applied by the trial court? The Court considered and approved the standard applied by the District Court as clearly expressed by the Court in its opinion (Petition P. 8a) where the Court considering the record stated the manner in which the Contract Carriers, Inc. unit was being operated may be found to have contributed to Schlagenhauf's judgment error and thereby constituted a concurring substantial factor with the negligence of the driver of the bus, and upon this basis went on to state: "The standards of causal negligence under Indiana law are met thereby. *Huey* v. *Milligan*, 242 Ind. 93, 175 N. E. 2d 698, 703 (1961). The manner of operation of said vehicle as determined by the District Court further may be deemed to have impeded the normal and reasonable flow of traffic in violation of § 47-2006, Burns' Indiana Statutes." (Petition P. 8a.)

In view of the fact the Court of Appeals obviously reviewed and approved the legal standards applied by the trial court, the argument presented by the Petitioners in paragraph II C is inapplicable. (Petition PP. 14-15.)

However, the citation by the Petitioners of *U. S.* v. *Singer Mfg. Co.*, (1963), 374 U. S. 174 and *U. S.* v. *Parke Davis & Co.*, (1960), 362 U. S. 29, direct appeal cases to this Court, and the statement, "Both Singer and Parke Davis held where there are essentially undisputed facts, the application of a standard necessarily presents only a question of law" (Petition P. 15), reflect a continuing error on the part of the Petitioners which the Petitioners attempted to foster upon the Court of Appeals without success and which they now attempt to foster upon this Court.

That basic error is that the case at bar cannot under any circumstances be considered a case of undisputed facts. To argue and contend that this case involved only undisputed facts is wholly unsupported and is an argument conceived out of desperation.

The following are only a few of the key issues which were vigorously controverted and which involved the credibility of the chief witnesses, Schlagenhauf and McCorkhill: (1) Did the operator of the bus observe the Contract Carrier unit before collision? (2) Was the Contract Carriers unit properly lighted? (3) The speed of the truck. (4) The speed of the bus. (5) The condition of the operator of the bus. (6) The condition of the windshield of the bus. (7) The distance between the vehicles. (8) The period of time the operator of the bus had to observe and react. (9) The manner in which the bus was being operated. (10) McCorkhill's denial of the prior conviction for operating a defective vehicle. (11) Where the bus was with respect to the truck when Schlagenhauf observed the lights. (12) The location of the Contract Carriers unit with respect to the lanes of travel. (13) Where the impact occurred. (14) The nature of the defect existing in the Contract Carriers unit. (15) The conflicting testimony of McCorkhill and his employer as to his instructions with respect to the defective vehicle.

The Petitioners purport to set out at page 12 of their Petition a "fair recital" of the evidence upon which the trial court's findings and the Court of Appeals Judgment were based as support for a theory that the lower court decision as well as the concurrent findings of the Court of Appeals were not supported by substantial evidence of probative value.

Consider the evidence upon which the concurrent findings were based: Petitioners were operating their 71,440 pound vehicle, at nighttime at a speed of 20 to 30 miles per hour on four-lane United States Highway 40, in open country, "you can roll through there like an ocean" (Dep. of Louis L. Stone, Plft. Appellee A. 5); Stone testified that McCorkhill told him at the scene of the accident his speed was 20-25 miles per hour (Appellants' A. 115). Mc-

Corkhill had experienced power troubles for over one hundred miles prior to the occurrence, and the closer McCorkhill got to home the slower the vehicle went. (Plft. Appellee A. 6). Contract Carriers had experienced similar difficulty on other occasions (Plft. Appellee A. 21-23), as had McCorkhill, (Plft. Appellee A. 29) and notified its employees of what to do in the event of such a power failure (Plft. Appellee A. 23 and 30) and had in fact placed a spare part in McCorkhill's vehicle (Plft. Appellee A. 30) which he had reason to believe was there (Plft. Appellee A. 30) but which he made no effort to use (Plft. Appellee A. 31) until after the tragic occurrence when he and another driver, not a mechanic, replaced the defective part in a matter of 15 minutes. (Plft. Appellee A. 37-38.) McCorkhill advised his employer his maximum speed was 25-30 miles per hour and testified his employer ordered him to operate on to his destination. (Appellants' A. 196.) That he was ordered on to his destination was denied by the employees of Contract Carriers, Inc. Their testimony was that McCorkhill was instructed to get the vehicle fixed and if he could not, to call back, and he failed to call back. (Plfts.-Appellees' A. 15, 17 and 19). Although McCorkhill was operating his vehicle upon the heavily traveled U. S. 40 at a pace he compared to a "kiddie car" (Plft. Appellee A. 34), McCorkhill took no steps to warn the motoring public of his crippled vehicle, a vehicle virtually stopped on the highway. (Plft.-Appellee A. 2.) Mr. Schlagenhauf, operating the bus, had come up behind the Stone vehicle which was being operated in an easterly direction in the same lane of travel as the Contract Carriers unit. (Appellants' A. 203.) He signaled his intention to pass (Appellants' A. 203), pulled into the passing lane and proceeded to pass. (Appellants' A. 203.) As he was passing Stone, he observed red lights down the road which he could not describe as to number (Appellants' A. 149-150), which he presumed

to be on a vehicle, but they appeared far enough down the road that they were of no warning or threat to him. (Appellants' A. 149.) He continued to give to the Stone vehicle his attention (Appellants' A. 149) in passing. Stone indicated the bus was safely past and could return to the right-hand lane (Appellants' A. 107) and Schlagenhauf signaled he was returning (Appellants' A. 143), checked the position of the Stone vehicle in his rear view mirror (Appellants' A. 143), resumed his driving position (Appellants' A. 203) and observed the left rear of the Petitioners' vehicle ahead of him. Schlagenhauf swerved hard left but struck the left rear of the truck with about 24 inches of the right front of the bus. (Appellants' A. 205.) Stone hit his brakes, turned left to avoid any contact with vehicles and moved around the colliding vehicles. (Appellants' A. 111-112 and 120.) The time that expired between the time the bus passed the Stone vehicle and the collision was considerably less than eight seconds according to Stone (Plft. Appellee A. 5) and about five seconds according to Schlagenhauf. (Appellants' A. 206.)

We respectfully submit the concurrent findings of the Court of Appeals and the District Court are sufficiently supported by the record, and the Court of Appeals properly fulfilled its function in terms of accepted procedure of appellate review.

III.

The Judgment of the Seventh Circuit Court of Appeals Affirming the Trial Court Is Consistent With the Law of Indiana and the Law of Other States Construing Similar or Identical Statutes.

The judgment of the Court of Appeals is squarely in line with Indiana law and with decisions of appellate courts in other states construing identical or similar low speed statutes.

The Court of Appeals stated:

> "Whether or not, under the circumstances revealed by the record, the operation of the Contract Carriers, Inc. tractor-trailer was at such a low speed as to deceive others upon the highway and to constitute an impediment to traffic must be determined by the trier of the facts." (Petitioners' A. P. 9a.)

This statement by the Court of Appeals in concurring with the findings of the lower court follows Indiana law as clearly set out in *Pohlman* v. *Perry,* 1952, 122 Ind. App. 222, 103 N. E. 2d 911, wherein the Indiana court, construing Section 47-2006 of Burns' Indiana Statutes Annotated, stated at page 915:

> "An examination of this statute also reveals that its application involves a question of fact for the trier of the cause . . . whether or not appellee's speed was unreasonably slow and whether or not traffic upon the highway was unreasonably impeded or blocked by the appellee, were questions of fact for the jury."

The above statement of the Court of Appeals and the Indiana construction of the statute are also supported by decisions in other states construing similar or identical statutes.

Seaton v. *Spence,* (1963), 215 Cal. App. 761, 30 Cal. Reptr. 510.

Templar v. *Tongate,* (1953), 71 Wyo. 148, 255 P. 2d 223.

Lafferty v. *Wattle,* (1961), ... Mo. App. ....., 349 S. W. 2d 519.

Angell v. *Hester,* (1960), 186 Kan. 43, 348 P. 2d 1050.

Griffin v. *Illinois Bell Telephone Company,* (1962), 34 Ill. App. 2d 87, 180 N. E. 2d 228.

Engelson v. *Aanenson,* (1963), 267 Minn. 1, 124 N. W. 2d 360.

Netterville v. *Crawford,* (1958), 233 Miss. 562, 103 So. 2d 1.

The Court of Appeals has not altered or created law for the State of Indiana. Burns' Indiana Statutes Annotated, Section 47-2006, has been the law of Indiana since 1939. *Pohlman* v. *Perry,* (1952), 122 Ind. App. 222, 103 N. E. 2d 911, has been the law of Indiana since 1952.

In effect, the Petitioners argue that a determination under Section 47-2006 as to what constitutes illegal "low speed" should be determined as a matter of law. The Petitioners argue that because the Petitioners' vehicle was equipped with nine red lights, as a matter of law, the Indiana statute could not apply. To follow such an argument would have brought the Court of Appeals in direct conflict with the law of Indiana and the case law of states construing slow speed statutes and in direct conflict with the spirit of slow speed statutes. Had the legislature intended violations of the statute to be determined as a matter of law, a specific speed would have been set out in the statute.

As was stated by the Indiana Appellate Court in *Pohlman* v. *Perry,* page 915:

> "... This statute does not fix a speed which makes its violation negligent as a matter of law ... 'Such a slow speed' is a question of fact."

The Court of Appeals by the decision in this cause has not held that as a matter of law operating at 20-30 miles per hour constitutes a violation under Section 47-2006. The Court of Appeals properly held that the trier of the facts could have so determined under the circumstances then and there existing and that the Court of Appeals could not say, as a matter of law, that such was not a violation. Each case must stand on its own merits, its own facts, on its own circumstances, and thereupon the determination as to violation must be made by the trier of the facts who observed and heard the witnesses.

36 states have adopted legislation identical or similar to Section 47-2006. This legislation is in recognition of the potential hazard created by the slow-moving motorist. Lack of speed as well as speed can be a killer upon heavily traveled public highways. Necessarily whether or not low speed is such that constitutes a violation under statute must be determined upon the circumstances existing at the time. State legislatures have recognized, and particularly Indiana, in Section 47-2006:

> "... except when reduced speed is necessary for safe operation, or in compliance with law."

that there may be legal excuse for low speed; however, there was no showing of legal excuse in the case at bar.

The interpretation of Indiana law by the Court of Appeals is consistent with Indiana law and does not conflict with the interpretation of similar or identical slow speed statutes of other states. Thus the argument of the Petitioners that the decision of the Court of Appeals will create some kind of national confusion amounts to a mere unsupported assertion. Nothing could be more just or equitable than permitting each case to stand on its own facts, on its own merits as determined by the person or persons who heard and saw the witnesses in the trial of the cause.

IV.

There Does Not Exist a Conflict Between Panels of the Seventh Circuit Court of Appeals Nor Has the Court of Appeals Rendered a Decision in Conflict With the Decision of Another Court of Appeals on the Same Matter.

There is no conflict between the decision of the Court of Appeals in this cause and the decision of the Court of Appeals in *U. S. Ex. Rel. Rogers* v. *Lane* (C. A. 7th 1965), 345 F. 2d 357, as argued by the Petitioners.

This is an example of the extreme "reaching" for issues indulged in by the Petitioners.

The Court of Appeals in *U. S. Ex. Rel. Rogers* v. *Lane,* a criminal cause arising out of a habeas corpus proceeding, footnoted *Gediman* v. *Anheuser-Busch* (C. A. 2d, 1962), 299 F. 2d 537, not for the principle propounded by the Petitioners but merely footnoted said case as support for the rule that a conclusion of law may be reviewed by the court, especially when the only evidence received by the court was documentary, and the trial did not involve any question as to the veracity of witnesses.

The assertion that the decision in *U. S. Ex. Rel. Rogers* v. *Lane,* stands for the proposition that a trial judge's determination of negligence is a conclusion of law, when the cause before the Court in *Rogers* v. *Lane* was a criminal matter wherein negligence was not an issue fails for lack of support on consideration.

The judgment of the Court of Appeals in the cause at bar with respect to the treatment on appeal of a trial judge's findings and conclusions with regard to negligence and proximate cause is consistent with other panels of the Seventh Circuit.

Leatherman v. *Gateway* (C. A. 7th, 1964), 331 F. 2d 241.

Parker v. *Heresy* (C. A. 7th, 1961), 295 F. 2d 731.

The Petitioners conclude at pages 15 to 17 of the Petition that there exists a conflict among the circuits with respect to the treatment of the reviewing court of a judge's "determination of negligence." We submit the conclusion reached by the Petitioners is based solely on semantics and the failure of the Petitioners to define what is embodied in a "determination of negligence."

First, we submit that even if the argument of the Petitioners was accepted at face value, which of course we do

not, the Court of Appeals has not "rendered a decision in conflict with the decision of another Court of Appeals on the same matter" (Rules of Supreme Court of the United States—Rule 19); because this litigation has not been the subject of review by any other Court of Appeals. An example of a conflict "on the same matter" would be a difference in interpretation of the validity and scope of a particular patent by two Courts of Appeals such as was the case in *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U. S. 387, wherein certiorari was granted, then dismissed. The facts in the case at bar have not been considered by another Court of Appeals.

Second, a reading of the case of *Gediman* v. *Anheuser-Busch, Inc.* (C. A. 2d, 1962), 299 F. 2d 537, relied upon by the Petitioners as primary support for their contention of conflict, reveals that the Court in that particular case, in speaking of a judge's "determination of negligence", was referring to the application of the *applicable standard of care,* not evidentiary findings as reflected by the statement of the Court as follows (our emphasis):

> "To us this seems directed to the issue whether the letter of September 17, 1956, met the applicable standard of care—not whether Barsi relied on it, as to which a much fuller discussion of the evidence would have been needed. If we are right in so reading the opinion, we are in no way concluded by it."
>
> *Gediman* v. *Anheuser-Busch, Inc.* (C. A. 2d, 1962), 299 F. 2d 537 at 547.

Thus the Court in *Gediman* v. *Anheuser-Busch, Inc.*, in using the words "determination of negligence" was referring to the trial court's determination and application of the appropriate legal standard. There is no contention by the respondents nor by the Seventh Circuit Court of Appeals that the reviewing court must accord a judge's determination of the *applicable legal standard* the protection of the "Unless Clearly Erroneous" Rule.

The Second Circuit in the later 1963 case of *Castro* v. *Moore-McCormack Lines, Inc.* (C. A. 2d, 1963), 325 F. 2d 72 at page 75, in specially considering the question recognized and clarified this question, stating that if the trial court misapplied the law in reaching his conclusory findings, such findings may be set aside.

> "There is no real inconsistency, we think. It is merely a question of separating the legal from the factual elements involved in the conclusory statements where these involve a mixture of law and fact. Thus, as is implicit in what we have already said in this opinion, if the trial judge, in assaying the proofs, including questions of credibility and the drawing of inferences of fact, can be shown to have arrived at his conclusory findings by a misapplication of the law, we must set aside the findings thus made."

Thus again we see the Court in the Second Circuit is speaking of "determination of negligence" as review of the applicable legal standard, not the evidentiary findings of the trial court.

The Fourth Circuit case of *Olah* v. *S. S Jaladurga* (C. A. 4th, 1965), 343 F. 2d 457, cited by the Petitioners as additional authority for a conflict between circuits, is distinguished from the case at bar in view of the fact in *Olah* v. *S. S. Jaladurga* the facts were not in dispute. However, the Court concluded in harmony with other circuits that a judge's findings distilled from evidentiary facts are secured by the "clearly erroneous" precept.

> "Of course, when an ultimate conclusion is to be drawn from evidentiary facts already agreed or found, but the answer is also dependent upon a selection of factual inferences which are reasonably deductible from the underlying facts, the conclusion is one of fact. . . . In that event the conclusion is secured by the 'clearly erroneous precept."

These decisions do not reflect a real and embarrassing conflict between the Circuit Courts of Appeals.

These decisions make it clear that the Court of Appeals on review should accord the evidentiary findings of the trial court, with respect to negligence and proximate cause, the "unless clearly erroneous" precept, but the Court of Appeals may freely review the legal standard applied by the trial court.

These rules of appellate review were followed by the Court of Appeals in considering and approving the evidentiary finding of the trial court contained in Finding of Fact No. 11 and approving the standards of conduct applied by the trial court contained in Burns' Indiana Statutes Annotated, Section 47-2006 and the common law of the State of Indiana as more fully argued under Paragraph II of this Argument.

There, therefore, exists no conflict between the judgment in the case at bar and the decisions of other Courts of Appeal.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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MISCELLANEOUS

Rule 52(a) Federal Rules of Civil Procedure. 2

IN THE

Supreme Court of The United States

October Term, 1966

No. 264

CONTRACT CARRIERS, INC. and JOSEPH L. McCORKHILL,

Petitioners,

v.

JOHN ANTHONY MARKIEWICZ, a minor, by his Father and next friend, EDWARD MARKIEWICZ, and EDWARD MARKIEWICZ and JENNIE MARKIEWICZ, and THE GREYHOUND CORPORATION and ROBERT L. SCHLAGENHAUF,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS', THE GREYHOUND CORPORATION AND ROBERT L. SCHLAGENHAUF, BRIEF IN OPPOSITION

The Respondents pray that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to review a Judgment of that Court entered in the entitled case on March 24, 1966, be denied.

QUESTIONS PRESENTED

1. Should this Court grant further appellate review of evidence and inferences drawn therefrom, by means of certiorari, in a negligence case?

2. Should this Court grant certiorari where the Circuit Court of Appeals afforded a proper and complete appellate review?

3. Should this Court grant certiorari to review the determination of an Appellate Court that the findings of fact of the trial court have sufficient support in the record?

4. Should this Court grant certiorari to review the determination of an Appellate Court that the trial court's conclusions of law are correct and that the inferences drawn from disputed facts by the trial court are permissible?

5. Should this Court grant certiorari where Petitioners have not demonstrated an issue of national importance nor demonstrated a real conflict of opinion or authority exists between circuit courts or the panels of the Seventh Circuit?

STATUTES AND FEDERAL RULES INVOLVED

Section 47-2006, Burns' Indiana Statutes Annotated (1952 Repl. Supp.)

> "No person shall drive a motor vehicle at such a low speed as to impede the normal and reasonable movement of traffic, except when reduced speed is necessary for safe operation or in compliance with the law."

Rule 52(a) Federal Rules of Civil Procedure:

> "(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate

judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a matter, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b)."

STATEMENT OF FACTS

John Anthony Markiewicz and Jennie Markiewicz, plaintiffs, were paying passengers aboard a Greyhound Bus, operated by Robert L. Schlagenhauf in the eastbound lanes of U. S. Highway 40, which is a four-lane divided highway, at about 1:05 A. M. on July 13, 1962, between Stilesville and Belleville, Indiana, when the bus collided with the left rear of a Trailmobile trailer pulled by a 1960 G.M.C. tractor owned by Contract Carriers, Inc. and operated for them by Joseph L. McCorkhill.

The G.M.C. tractor had experienced loss of ability to produce normal forward speed for over 100 miles prior to reaching the point of collision. The driver of the tractor, McCorkhill, made several stops to investigate the cause of the power failure and had contacted the Contract Carriers dispatcher at Anderson, Indiana, advising the dispatcher that the maximum forward speed of his vehicle was about 30 miles per hour. McCorkhill was authorized to operate the unit to its destination.

The slow down of the McCorkhill vehicle was due to a progressive accelerator breakdown which progressively diminished the amount of acceleration.

Prior to this collision, Contract Carriers, Inc. had experienced this type of defect with all the tractors of this type and to enable emergency repair had placed a spare part in the glove compartment of each vehicle.

McCorkhill had experienced similar difficulty on a previous occasion and had reason to believe a spare part with which to correct the defect was available in the glove compartment of the tractor which he was operating.

McCorkhill, without making any repair, continued east on U.S. Highway 40 at a speed of 20 to 30 miles per hour.

Schlagenhauf, the operator of the Greyhound Bus, overtook an eastbound tractor-trailer operated by one Louie L. Stone in the southernmost lane of highway 40. After passing the Stone vehicle, Schlagenhauf operated his right turn signals and started to turn the bus from the northernmost lane in front of the Stone vehicle and reviewed the passed vehicle in his rear view mirror. He observed red lights in front of him and started to return the bus to the northernmost lane to pass the vehicle, but about 24 inches of the right front of the bus collided with the left rear of the trailer.

Schlagenhauf did not correctly associate the proximity of the red lights he observed in front of him after passing the Stone vehicle and did not correctly compare his speed with the speed of said lights during and immediately after passing the Stone vehicle. He did not recognize a collision was imminent until it was too late to avoid it.

After three days of trial to a jury a stipulation as to damages was reached. The Petitioners, Contract Carriers,

Inc. and Joseph L. McCorkhill, with all parties to the action concurred in waiving the jury and elected to proceed to try the issues of liability to the Court. The District Court found that Petitioners failed to perform their statutory duty to the plaintiffs in that Petitioners' vehicle was operated at such a low speed as to impede the normal and reasonable movement of vehicular traffic, and that the conduct of McCorkhill was contrary to the conduct a prudent operator of a tractor-trailer exercising ordinary care would have used under the same circumstances. The Court further found that such conduct constituted causal negligence along with the negligence of the driver of the bus in bringing harm to the plaintiffs.

The United States Court of Appeals for the Seventh Circuit affirmed the judgment of the District Court by a two to one decision and sitting En Banc denied a Petition for Rehearing En Banc by a six to one decision.

REASONS TO DENY THE WRIT

Respondents urge that this Writ be denied for the following reasons:

I. This Court should not grant certiorari to provide further appellate review of evidence and the inferences drawn therefrom in a negligence case.

II. The Petitioners received a proper and complete appellate review consistent with the accepted and usual course of judicial procedure.

III. This Court should deny certiorari where Petitioners have not demonstrated an issue of importance nor demonstrated that a real conflict of opinion or authority exists between the Circuit Courts or the panels of the Seventh Circuit.

IV. Federal District Courts must apply state statutes as construed by the state courts. The Court of Appeals' affirmation of the Judgment rendered by the Federal District Court for the Southern District of Indiana is in accord with Indiana law and consistent with decisions in other states.

I.

THIS COURT SHOULD NOT GRANT CERTIORARI TO PROVIDE FURTHER APPELLATE REVIEW OF EVIDENCE AND THE INFERENCES DRAWN THEREFROM IN A NEGLIGENCE CASE.

This case is strictly a negligence case. The importance of the case is confined to the litigants and to the particular fact situation which gave rise to a collision between a Greyhound Bus and a tractor-trailer. Negligence cases, which do not also present a question of constitutional law or other questions of major importance, as set out in Rule 19 of the Rules of the Supreme Court, should not be reviewed on certiorari for the reason that the interpretation of facts as opposed to rules of law become the elements of contention, and this Court would be required to sit not as an appellate tribunal but as another trial court.

This Court has stated it would not grant certiorari for the purpose of reviewing evidence and discussing specific facts. *General Talking Pictures Corp. v. Western Electric Co.*, 304 U. S. 175 (1938); *United States v. Johnston*, 268 U. S. 220 (1925).

The Petitioners' vehicle for obtaining further review in the Supreme Court is a claim that the United States Court of Appeals for the Seventh Circuit erred in the review granted Petitioners before the Circuit Court by failing to

find that the judgment of the United States District Court for the Southern District of Indiana was clearly erroneous and under Federal Rule 52(a) should be set aside.

The criteria for application of Rule 52(a) was summarized in *McAllister v. United States,* 348 U. S. 19 (1954). Obviously the Appellate Court, after a review of the evidence, was not left with a definite and firm conviction that a mistake had been made, as Petitioners believe they should have.

This cause appears to be precisely one of a class of cases which Justice Frankfurter in a separate opinion in *McAllister v. United States, supra,* urged this Court to reject. The Justice commented:

> "If there is any class of cases which plainly falls outside the professed considerations by which this Court exercises its discretionary jurisdiction, it is cases involving only interpretation of facts bearing on the issue of causation or negligence. The standards of judgment in this type of litigation are well settled. The significance of facts become the bone of contention, and the facts stir differences that derive from the very elusiveness of the meaning of the myriad unique sets of circumstances in negligence cases. One's deep sympathy is, of course, aroused by a victim of the hazards of negligence litigation in the situations like the one before us."
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> *McAllister v. United States,* 348 U. S. 19 at 23. (Separate Opinion by J. Frankfurter.)

McAllister v. United States is significant in that the Supreme Court championed the findings of the District Court in a negligence determination and indicated that in such negligence determinations an Appellate Court should not reverse "unless clearly erroneous."

The Court of Appeals for the Seventh Circuit, having thoroughly reviewed the evidence in the present case, held that the finding of the District Court had "sufficient support in the record." (Petitioners' Appendix A, page 9a). Under the clearly erroneous precept this was the only determination the Court of Appeals needed to perform.

The Court of Appeals was cognizant of the Court's position on review and performed the Court's obligation in this case consistent with other panels of the Seventh Circuit. *Smoczynski v. The United States,* 352 F. 2d 44 (7th Cir. 1965); *Koehler v. Ellison,* 226 F. 2d 682 (7th Cir. 1955).

The Petitioners request the Supreme Court to review the concurrent findings of fact made by the District Court and the United States Court of Appeals for the Seventh Circuit. The Supreme Court has indicated the Court's reluctance for such an undertaking "in the absence of very obvious and exceptional showing of error." *Graver Tank and Mfg. Co. v. Linde Air Products Co.,* 336 U. S. 271, 275 (1949).

The Petitioners assert but fail to make a stringent showing of error. Petitioners further have failed to show what constitutional or other important public questions are based upon the factual determination which would warrant this Court ignoring the "two court" rule that concurrent findings shall not be disturbed.

II.

THE PETITIONERS RECEIVED A PROPER AND COMPLETE APPELLATE REVIEW CONSISTENT WITH THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEDURE.

The Petitioners allege that this Writ should be granted

based upon the contention the decision of the United States Court of Appeals for the Seventh Circuit constituted a departure from accepted and usual course of judicial procedure. In support thereof, the Petitioners have cited several cases for the general proposition that Appellate Courts may review the findings of fact to determine whether they are supported by sufficient evidence. Petitioners cite:

Helvering v. Tex. Penn. Oil Co., 300 U. S. 481 (1936);

Sanders v. Leach, 158 F. 2d 486 (5th Cir. 1946);

Western Cottonoil Co. v. Hodges, 218 F. 2d 158 (5th Cir. 1954).

The Respondents take no issue with the proposition that the Appellate Courts may review findings of fact to determine whether they are supported by sufficient evidence. However, the Respondents do urge that careful attention be given to the opinion written by the United States Court of Appeals for the Seventh Circuit and found at 358 F. 2d 26 and at page 2(a) in Appendix A to Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit. With reference to the opinion of the Circuit Court, it is apparent that the Court accorded the record a careful and critical analysis.

Specifically, attention is called to the following portions of the opinion which manifest the alertness of the Court to the Court's position on review. For instance:

> "The issue before the Court is whether the *record* supports a finding that the speed at which the Contract Carriers, Inc. vehicle was being operated constituted causal negligence as to the plaintiffs in that it misled and deceived the driver of the bus and impeded the flow of traffic upon the highway. *This finding will not be disturbed on appeal if it may be sustained upon*

a rational view of all of the evidence including all reasonable inferences of which the testimony is susceptible. Smoczynski v. United States, 352 F. 2d 44 (7th Cir. 1965.)" (Emphasis ours)

In regard to the Appellate Court's consideration of the operation of the Contract Carriers vehicle misleading the driver of the Greyhound Bus, the Court stated:

"*Consideration of the record* discloses the operation of the Contract Carriers, Inc. vehicle in the manner and under the circumstances shown here may be found to have contributed to Schlagenhauf's error in judgment as to the relative position and speed of the vehicle . . . ." (Petitioners' Appendix A, page 7a) (Emphasis ours.)

The Petitioners attack the trial court's Finding of Fact No. 11 as having no evidentiary basis. The Appellate Court, reviewing the entire record, not pieces or segments, found to the contrary:

"Significant factors to be considered in the instant case are the time and opportunity of Schlagenhauf for observing and evaluating the relative position and speed of the Contract Carriers, Inc. vehicle. *The evidence* shows that Schlagenhauf approached from the rear. His view of this vehicle had been obstructed by the intervening tractor-trailer operated by Stone. On clearing the Stone tractor-trailer, Schlagenhauf reached a position from which he could observe the lights mounted on the rear of the trailer towed by Contract Carriers, Inc. tractor. At this time, his attention was also directed to the vehicle he had just passed. Schlagenhauf's belief that the lights ahead were of no cause to concern him and his action in returning the bus to the southernmost lane clearly indicate that he had made an erroneous assessment of the situation.

"Although the mistake in judgment was that of Schlagenhauf, it does not follow that the collision as a matter of law must necessarily be attributed solely to him. His conduct in passing and giving attention to the Stone vehicle may be characterized as normal incidents of highway travel. Further, the normal flow of traffic does not exclude a situation in which the operator of one vehicle may have but a few seconds in which to arrive at an evaluation as to the speed and relative location of another vehicle on the highway. Under such circumstances, a vehicle proceeding at an unusually slow speed, that is, unusual in the light of the conditions of the road, the hour of travel, the amount of traffic on the highway, and the type of vehicle involved, may, by the very unexpectedness of its speed, mislead the operator of another vehicle who lacked the opportunity for a more prolonged observation.

"Schlagenhauf's negligence in the operation of the bus at an excessive speed and in failing to maintain a proper lookout unquestionably contributed to the impairment of his judgment. In light of his limited opportunity for observation of the Contract Carriers Inc. vehicle, his error may reasonably be found to have been induced also by the fact that the tractor-trailer was being operated at an unusually low speed—possibly as low as 20 miles per hour—of which its lights and general appearance on the highway gave no indication."

(Petitioners' Appendix A, page 6a, et sequa.) (Our Emphasis.)

In the case of *Sanders v. Leach,* 158 F. 2d 486, at 487, (5th Cir. 1946) quoted by the Petitioners, further direction as to the duties of the Appellate Court is given:

"It is not for the Appellate Court to substitute its judgment on a disputed issue of fact for that of the trial court where there is substantial credible evidence to support the finding."

The record reveals that the credibility of the witnesses orally heard by the trial judge were important in the determination as to whether operators approaching the Petitioners' vehicle from the rear were or were not misled.

Findings rendered in other causes dependent upon oral testimony and credibility of witnesses have been declared as ones particularly determinable by the trial court judge:

Koehler v. Ellison, 226 F. 2d 682 (7th Cir. 1955);

First National Bank of Colorado Springs v. McGuire, 184 F. 2d 620 (7th Cir. 1950);

M. W. Zack Metal Co. v. S. S. Birmingham City, 311 F. 2d 334 (2d Cir. 1962);

Weaver v. United States, 334 F. 2d 319 (10th Cir. 1964);

United States v. Skolness, 279 F. 2d 350 (8th Cir. 1960);

Molitor v. American President Lines, Ltd., 343 F. 2d 217 (9th Cir. 1965);

Baker v. United States, 343 F. 2d 222 (8th Cir. 1965);

Indemnity Insurance Co. v. Pioneer Valley Savings Bank, 343 F. 2d 634 (8th Cir. 1965).

The Seventh Circuit has followed the rule pronounced in *McAllister v. United States,* 348 U. S. 19 (1954), that Federal Rule 52(a) can be applied in a negligence determination and that a lower court's determination cannot be overturned unless "clearly erroneous." But, giving careful consideration to the opinion of the U. S. Court of Appeals for the Seventh Circuit in their determination of the Markiewicz case, one finds that the Court, whether it was re-

quired to or not, did make their own determination of the Petitioners' causal negligence.

> "This conduct may be deemed to constitute negligence." (Petitioners' Appendix A, page 8a)
>
> "*Consideration of the record discloses* that the operation of the Contract Carriers, Inc. vehicle in the manner and under the circumstances shown here may be found to have contributed to Schlagenhauf's error in judgment as to the relative position and speed of the vehicle, and that the operation of said vehicle thereby constituted a concurring, substantial factor, together with the negligence of the driver of the bus, in bringing about harm to the plaintiffs. *The standards of causal negligence under Indiana law are met thereby. Huey v. Milligan,* 242 Ind. 93, 175 N. E. 2d 698, at 703 (1961)." (Petitioners' Appendix A, page 7a et sequa.) (Emphasis ours.)

The Petitioners further urge that there was a departure from accepted and usual course of judicial procedure which should be corrected that arose from the Appellate Court's affirmation of the violation of the Indiana low speed statute, Burns' Indiana Statutes Annotated, Section 47-2006 (1952 Replacement Supplement). The Petitioners state that where the facts are undisputed, a question of law is presented upon which the Appellate Court should make its own determination.

The Respondents, The Greyhound Corporation and Robert L. Schlagenhauf, disagree with, and the record does not support, Petitioners contention that the facts were undisputed. Contrary to what the Petitioners assert, the facts were vigorously disputed. The oral testimony of the driver of the Greyhound Bus, Schlagenhauf, and the driver of the Contract Carriers unit, Joseph McCorkhill, conflicted on major dynamic portions of the evidence such as the speed

of the Greyhound Bus, the speed of the tractor trailer, the speed of the preceding vehicle, the distance between vehicles, time elements before contact, lanes of travel, position of lights, observance of lights, and a myriad of other controversies.

That the Court of Appeals for the Seventh Circuit failed to review the standard applied with reference to the Indiana slow speed statute is not borne out by the opinion written by the Seventh Circuit. Petitioners have continually urged, both here and in the Court of Appeals, that there was no basis for the finding that Petitioners violated the Indiana low speed statute because one lane of traffic was apparently clear and for the further reason the Petitioners' speed was of no consequence in the accident.

As the Appellate Court has stated (Petition Appendix A, P. 6a), under Indiana law this was a question of fact for the trier of the cause to be determined under the circumstances of the case. *Pohlman v. Perry,* 122 Ind. App. 222, 103 N. E. 2d 911, 915 (1952).

However, the Appellate Court examined those circumstances of the case upon which the appellants had been contentious. Applying the available case law and sifting the evidence in the record, the Appellate Court then determined:

> "The fact that an unobstructed lane of travel, that is, the northernmost of the eastbound lanes, may have been available to Schlagenhauf, did not as a matter of law obviate causal negligence which contributed to the bus driver's determination not to follow the unobstructed lane. *Seaton v. Spence,* 215 Cal. App. 761, 30 California Rptr. 510 (1963). Appellant's further theory that the collision would have occurred regardless of the speed of the tractor-trailer because of Schlagenhauf's conduct presents an area of speculation

which has *no support in the record and is not necessarily to be inferred from the evidence in the case.*" (Petitioners' Appendix A, page 8a.) (Emphasis ours.)

The Petitioners cite but do not discuss Sections 47-2010 and 47-2214(c) of Burns' Indiana Statutes Annotated as being applicable to this cause.

Neither statute was raised in the trial court, and neither statute has any application to this cause as was apparently the conclusion of the Court of Appeals.

May a motorist using the public highway elect to comply with one statute and thereby be immune from all others including the common law? May a motorist operating within one particular statute abandon reasonable prudence and care for the safety of others? Indiana has decided that a motorist may not operate with complete indifference or disregard of the safety of others. *H. E. McGonigal, Inc. v. Etherington,* 118 Ind. App. 622, 79 N. E. 2d 777 (1948).

Burns' Indiana Statutes, Annotated, Section 47-2214, has four sections which must be read together and construed together. Section 47-2214a entitled "Lamps on farm equipment" describes the required lamps for farm equipment. Section 47-2214b, "Rear lamps or flags on tractors or implements of husbandry—Definitions," defines the terms "truck-tractor", "farm tractor", "road tractor", "Implement of husbandry". Section 47-2214c entitled "Flashing lights, signal lamp or red flag required on federal, state or county highways" describes the lights required on the vehicles defined in Section 47-2214b when traveling less than 20 miles per hour, and Section 47-2214d makes a failure to comply with 47-2214c a misdemeanor.

That these statutes apply only to farm equipment such as tractors and implements of husbandry is supported by

Acts of 1963, Chapter 249, Sec. 1, page 376. Section 47-2214c was thereby amended by deleting the confusing words "truck-tractor" preceding "farm tractor"; deleting the word "or" preceding "of husbandry" and inserting the words "or horse-drawn vehicle" following "husbandry".

The vehicle operated by Contract Carriers and McCorkhill is not within the class of vehicles referred to in Burns' Indiana Statutes Annotated, Section 47-2241c.

Even if these statutes were applicable, they would not constitute an avoidance of Section 47-2006 or the common law but would rather constitute other duties imposed on the Petitioners in addition to Section 47-2006 and the common law of Indiana.

Thus the Petitioners were accorded a proper and complete appellate review.

III.

THIS COURT SHOULD DENY CERTIORARI WHERE PETITIONERS HAVE NOT DEMONSTRATED AN ISSUE OF IMPORTANCE NOR DEMONSTRATED THAT A REAL CONFLICT OF OPINION OR AUTHORITY EXISTS BETWEEN CIRCUIT COURTS OR THE PANELS OF THE SEVENTH CIRCUIT.

The Petitioners attempt to show conflict among the circuits as to whether a judge's determination of negligence as distinguished from the evidentiary facts leading to it is a conclusion of law or a finding of fact.

The Respondents urge that there is no real conflict among the circuits with respect to this alleged issue and further contend that such a question is moot with respect

to this case. Indiana has established the doctrine that if there is any reasonable doubt as to negligence or proximate cause, or where the determination of negligence depends upon a state of facts from which different minds might draw different inferences or conclusions, the issues of negligence and proximate cause are fact issues. *New York Central R. R. Co. v. Cavinder,* — Ind. App. —, 211 N. E. 2d 202 (1965).

The Respondents, The Greyhound Corporation and Robert L. Schlagenhauf, recognize that the selection of a standard of conduct is the act of the trier of the facts in a case tried without a jury and as such the "standard" is subject to review. *Pacific Tow Boat Co. v. States Marine Corp. of Dela.,* 276 F. 2d 745 (9th Cir. 1960).

The District Court of Southern Indiana used the standard of ordinary care in determining McCorkhill's negligence in operating the tractor with knowledge that it did not have sufficient power to tow a trailer at sufficient speed to avoid impeding the normal flow of traffic (Petitioners' Appendix A, page 5a) and further applied the legal standard contained in Burns' Indiana Statutes Annotated, Section 47-2006 and the standards of causal negligence contained in *Huey v. Milligan,* 242 Ind. 93, 175 N. E. 2d 698, 703 (1961); all of which legal standards were reviewed and approved by the Court of Appeals. (Petition Appendix P. 8a).

The Court in the case of *Olah v. S. S. Jaladurga,* 343 F. 2d 457, (4th Cir. 1965) comments upon the law in cases such as this where the facts are contested.

> "Of course, when an ultimate conclusion is to be drawn from the evidentiary facts already agreed or found, but the answer is also dependent upon selec-

tion of factual inferences which are reasonable deducible from the underlying facts, the conclusion is one of fact. *Castro v. Moore-McCormack Lines, Inc., supra,* 325 F. 2d 72, 75. In that event the conclusion is secured by the 'clearly erroneous' precept. *McAllister v. United States, supra,* 348 U. S. 19, 20. 75 S. Ct. 6, 99 L. Ed. 20."

The case of *Gediman v. Anheuser-Busch, Inc.,* 299 F. 2d 537 (2d Cir. 1962) contains language which indicates the semantic problems involved in determining to what degree a determination of negligence is freely reviewable upon appeal. In the Gediman case, Judge Friendly writing the opinion, indicated that "a judge's determination of negligence as distinguished from the evidentiary facts leading to it is freely reviewable on appeal . . . " 299 F. 2d 537 at 547. A careful reading of the opinion en toto indicates that what the Court was reviewing in the Gediman case when it undertook a review of the determination of negligence was the *standard* which the trial court judge applied to make the determination that the defendants had been negligent in misinforming the plaintiffs as to the consequences of an election of various pension plan options. The Appellate Court reviewing this determination concluded there was error in the *standard* applied by the trial court in that the trial court had not made a determination that the plaintiff had relied upon the conduct of the defendant. Such determination was necessary in order to hold defendants liable. (our emphasis.)

A subsequent case within the Second Circuit, *Castro v. Moore-McCormack,* 325 F. 2d 72 (1963) casts further light upon appellate review of negligence determinations. There the Court after comparing phraseology among the Appellate Court decisions, both in the Second Circuit, other cir-

cuits, and by the United States Supreme Court, made this comment:

> "There is no real inconsistency we think. It is merely a question of separating the legal from the factual elements involved in the conclusory statements where these involve a mixture of law and fact. Thus, as it is implicit in what we have already said in this opinion, if the trial judge in assaying proofs, including questions of credibility, can be shown to have arrived at his conclusionary findings by a misapplication of the law, we must set aside the findings thus made."
>
> *Castro v. Moore-McCormack,* 325 F. 2d 72 at 75.

The Petitioners have failed to state what law or standard of care should have been applied.

Where the standards are settled it would then appear that the "clearly erroneous" precept can be correctly applied to evidentiary facts and the determination of the evidentiary facts should not be overturned unless "clearly erroneous." *McAllister v. United States,* 348 U. S. 19 (1954); *Morales v. City of Galveston,* 370 U. S. 165 (1962).

The case of *United States ex rel. Rogers v. Lane,* 345 F. 2d 357 (7th Cir. 1965) was a criminal action appealing the final order in a habeas corpus proceeding. The evidence in the District Court was entirely documentary and there was little disagreement as to the facts. For the purpose of supporting the proposition that a conclusion of law is reviewable, the Court of Appeals cited in a footnote along with other decisions both in the Seventh Circuit and elsewhere the case of *Gediman v. Anheuser-Busch, Inc., supra.* Respondents support this proposition that a conclusion of law is reviewable. As Respondents have shown, there is no real conflict between the decision in the Gediman case,

supra, and decisions in other circuits, including the Seventh Circuit, regarding the extent to which legal standards and findings of fact are reviewable.

The Respondents point out that whether it was necessary or not, the United States Court of Appeals for the Seventh Circuit reviewed the facts of McCorkhill's operation of the tractor with knowledge of its defects and also arrived at an independent determination of negligence. (Petitioners' Appendix, page 8a.)

IV.

FEDERAL DISTRICT COURTS MUST APPLY STATE STATUTES AS CONSTRUED BY THE STATE COURTS. THE COURT OF APPEALS' AFFIRMATION OF THE JUDGMENT RENDERED BY THE FEDERAL DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA IS IN ACCORD WITH INDIANA LAW AND CONSISTENT WITH DECISIONS IN OTHER STATES.

The Petitioners contend that their Petition for a Writ of Certiorari should be granted in order that the Supreme Court could in some unexplained way effect a national policy as to a national minimum speed. As Petitioners pointed out, and as appendixed to their Petition, (Petition-Appendix B PP. 14a-15a) some 36 states now have enacted versions of minimum speed statutes. These statutes are similar but are not exactly alike, and have been enacted at various times in the various states within the past twenty to thirty years. All traffic laws have originated in the same manner. The doctrine set out in *Erie v. Tompkins,* 304 U. S. 64 (1938) reflects that how and in what manner state statutes are construed is a matter for the state courts.

The Federal District Court for Southern Indiana, following the law set out in the Indiana case of *Pohlman v. Perry*, 122 Ind. App. 222, 103 N. E. 2d 911 (1952), that violation of such statute involves a question of fact for the trier of the facts, found that the low speed of the tractor-trailer unit "impeded the normal and reasonable movement of traffic at the time and place in question." Such a determination is in accord and consistent with the decisions of other states which have had an occasion to construe similar slow speed statutes.

Seaton v. Spence, 215 Cal. App. 51, 30 Cal. Reports 510 (1963);

Lafferty v. Wattle, 349 S. W. 2d 519 (Mo. App. 1961);

Templar v. Tongate, 71 Wyo. 48, 255 Pac. 2d 223 (1953);

Hageman v. Townsend, 144 Mont. 510, 398 Pac. 2d 12 (1965);

Griffin v. Illinois Bell Telephone Co., 34 Ill. App. 87, 180 N. E. 2d 228 (1962).

Clearly, the Circuit Court and the District Court in the case at bar in their concurrent findings have applied what has been the law in the State of Indiana and in many other states for some time, and have not construed the Indiana statute in a manner that is inconsistent with the construction applied by the state court.

If the Petitioners seek a national policy as to minimum speed, the remedy rests with legislative processes. The diversification in minimum speed statutes presents no greater problem than the diversification among the various traffic laws within the respective states. It is obviously appar-

ent that no court can prescribe as Petitioners seek, a determination of the "obligations of all motor vehicle operators" (Petition P. 19).

Decisions to date recognize, contrary to the importance which Petitioners ascribe to speed alone, that:

> "This statute does not fix a speed which makes violation negligent as a matter of law. It merely provides that vehicles shall not travel at such a slow speed as to impede or block the normal and reasonable flow of traffic. Such slow speed is a question of fact . . . Whether or not appellee's speed was unreasonably slow and whether traffic upon the highway was unreasonably impeded or blocked by the appellee were questions of fact for the jury."
>
> *Pohlman v. Perry*, 103 N. E. 2d 911 at 915 (1952).

That the emphasis is not upon speed alone within a minimum speed statute is clearly shown also by the decision in *Lafferty v. Wattle*, 349 S. W. 2d 519 at 528 (1961) wherein the Court stated:

> "Under such a statute which does not fix the specific rate of speed, the question of whether the speed involved is so slow as to impede normal and reasonable traffic is broadly, one for the trier of fact, when reasonable men could so find."

The decision of the Court of Appeals in this cause could hardly affect vehicle traffic throughout the United States as contended by the Petitioners (Petition P. 19) when the judgment in this cause can only bind the parties, and the Court of Appeals has clearly stated a violation of a slow speed statute is a matter to be determined by the trier of the facts. Thus the fact finder in every piece of litigation involving the construction of a slow speed statute from Maine to California is free and in fact has a duty to con-

sider each case on its own merits considering all the facts and inferences to be drawn therefrom in making a determination as to statutory violation.

To contend that the facts in this cause and the Court's findings upon those special facts somehow bind other courts and other parties across the nation is parallel to arguing that a jury verdict in a negligence case in Indianapolis, Indiana, affirmed by the Indiana Supreme Court is binding upon a jury sitting in upstate New York considering the always varying, changing facts of a negligence case. Such an argument fails for the lack of any semblance of legal support.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this case is not an appropriate case for the exercise of this Court's discretionary jurisdiction and that this Petition for Writ of Certiorari should be denied.

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No. 264

CONTRACT CARRIERS, INC. and
JOSEPH L. McCORKHILL,
Petitioners,

v.

JOHN ANTHONY MARKIEWICZ, a minor
by his father and next friend,
EDWARD MARKIEWICZ, and
EDWARD MARKIEWICZ, and
JENNIE MARKIEWICZ, and
THE GREYHOUND CORPORATION, and
ROBERT L. SCHLAGENHAUF,
Respondents.

PETITIONERS' REPLY BRIEF

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IN THE

Supreme Court of The United States

OCTOBER TERM, 1966

No. 264

CONTRACT CARRIERS, INC. and
JOSEPH L. McCORKHILL,
Petitioners,

v.

JOHN ANTHONY MARKIEWICZ, a minor
by his father and next friend,
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PETITIONERS' REPLY BRIEF

The controlling facts in this case are undisputed irrespective of Respondents' assertions. The facts found by the trial court are: the tractor-trailer was traveling twenty (20) to thirty (30) miles per hour in the righthand lane of a four-lane divided highway at night with nine (9) red lights visible five hundred feet (500') to the rear

when the truck was struck from the rear by a Greyhound bus traveling seventy-five (75) miles per hour.

Upon these facts the trial court made its determination of negligence. Petitioners sought review of this conclusion of law by the Court of Appeals. The Court of Appeals refused to review this determination because it misconstrued prior guidelines of This Court and misconceived the nature of the finding. The Court of Appeals should have determined whether the undisputed facts constituted negligence, rather than dodging the issue by saying it would not disturb the District Judge's decision unless the decision was "clearly erroneous." The doctrines set out in the Court of Appeals' opinion are applicable to findings of fact but have no application to conclusions of law. A Court of Appeals should never be bound by an erroneous view of the law held by a District Judge. Conclusions of law are either right or wrong. Upholding a District Judge's view of the law simply because two judges of the Court of Appeals say his view of the law is not "clearly erroneous" does not constitute proper review by the Court of Appeals.

Here we are confronted with the trial court's judgment that a tractor-trailer's traveling twenty (20) to thirty (30) miles per hour when struck in the rear by a speeding Greyhound bus constituted negligence. This judgment was based solely upon the so-called "slow speed" of the tractor-trailer. This judgment was reached even though the tractor-trailer had nine (9) red lights burning which were visible for five hundred feet (500') to the rear. This judgment was reached even though the tractor-trailer was traveling in the extreme righthand lane on a four-lane divided highway. This judgment was reached even though there was an unobstructed passing lane. In other words, the District Court, in interpreting the Indiana Slow Speed

Statute, decided the tractor-trailer driver was negligent solely because he was driving twenty (20) to thirty (30) miles per hour.

It is true that the truck was experiencing mechanical difficulties. But this fact is of no importance in determining negligence. It makes no difference whether the tractor-trailer was going twenty (20) to thirty (30) miles per hour because of a heavy load, because the vehicle was turning, or because there was a mechanical problem. The undisputed fact is that the vehicle was being operated at twenty (20) to thirty (30) miles per hour in the proper lane with adequate lighting and with an unobstructed passing lane when it was struck in the rear by the bus, which was traveling ten (10) miles per hour above the speed limit. These are the controlling facts and these facts are undisputed. The District Court incorrectly applied the Indiana Slow Speed Statute to these facts. This case has extended the slow speed statutes to such an extent that a driver of a tractor-trailer will never know when he is violating the law. He will never know if he is driving fast enough not to be impeding a speeding vehicle approaching from his rear. In any event, speed that impedes should only be considered in light of others lawfully using the highways. Since thirty-six (36) states have similar statutes, a proper application of these statutes is in the national interest.

The Court of Appeals failed to correct the error of law of the District Court because it misconceived its function in reviewing a court-tried negligence case. The appeals court felt that it was bound by the finding of causal negligence by the trial judge. This misconception occurred because the trial judge called "negligence" a finding of fact, when in reality it is a conclusion of law. By refusing to recognize "negligence" as a conclusion of law, the appeals court would not and did not determine from the

facts whether this conclusion was justified. This interpretation denied Petitioners effective review. Effective review does not mean a trial *de novo,* but it does mean a judicial determination as to whether findings of fact are supported by substantial evidence and, further, a judicial determination as to the correctness of the conclusions of law.

Effective review by the Courts of Appeal is to a litigant a right which should never be denied. Furthermore, so long as there are expanding dockets of negligence cases which are not effectively reviewed by Courts of Appeal, just so long will it be necessary to bring such cases to the Supreme Court upon petition. Reaffirmation of the guidelines for reviewing judge-tried cases is, therefore, not only appropriate but necessary whenever any circuit court of appeals misconceives its function or powers. Fundamental justice requires reaffirmation of these guidelines whenever an obviously incorrect result is reached, and this is particularly true when a decision will have an adverse effect on the future decisions of cases throughout the country.

The petition for certiorari has presented numerous reasons warranting review of this case. However, the most important reasons are to re-establish the guidelines to be used by the appeals courts in reviewing judge-tried cases and to correct a situation in which so obvious an injustice has been committed.

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